Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1997

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

v.

RICHARD SABO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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HAPP

QUESTION PRESENTED

Whether the Third Circuit erred in holding—contrary to the decisions of three other Circuits—that the McCarran-Ferguson Act does not preclude a federal RICO claim alleging unfair and deceptive sales practices in the sale of life insurance policies, where (i) the alleged sales practices constitute the "business of insurance," (ii) a comprehensive state statutory and regulatory framework squarely governs the challenged conduct, and (iii) RICO provides extraordinary mandatory remedies that are not available under the comprehensive state-law framework and would upset the balance of remedies established by state lawmakers.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner Metropolitan Life Insurance Company is a mutual life insurance company organized and existing under the laws of the State of New York. It has no parent company and no non-wholly owned subsidiaries other than the following:

AEW Advisors, Inc.
AEW Capital Management, Inc.
AEW Capital Management, L.P.
AEW Hotel Investment Corporation
AEW Hotel Investment Limited Partnership
AEW Investment Group, Inc.
AEW Management and Advisors, L.P.
AEW Real Estate Advisors, Inc.
AEW Real Estate Advisors, Limited Partnership
AEW Securities, L.P.
Albany General Insurance Company Limited
Aldrich Eastman Global Investment Strategies, LLC
Aurora Limited Partnership
Back Bay Advisors, Inc.
Back Bay Advisors, L.P.
BBC Investment Advisors, Inc.
BBC Investment Advisors, L.P.
BCOP Associates L.P.
Breen Trust Company
Capital Growth Management Limited Partnership
Centennial Equities Corporation
Chart House Enterprises, Inc.
COAC Co., Inc.
Coating Technologies International, Inc.
Copley Properties Company, Inc.
Copley Properties Company II, Inc.
Copley Properties Company III, Inc.

Copley Public Partnership Holding, L.P.
CREA Investors/Santa Fe Springs, Inc.
CREA Western Investors I, Inc.
CREA Western Investors I, L.P.
Cross and Brown Associates of New Jersey, Inc.
Cross and Brown of Connecticut, Inc.
Cross and Brown Company of Georgia, Inc.
Cross and Brown Company of Maryland, Inc.
Cross and Brown Company of Missouri, Inc.
Cross and Brown Company of Ohio, Inc.
Cross and Brown Residentials, Inc.
Dan River, Inc.
Eclipse Claim Services Inc.
Eighth Copley Corp.
Federal Street Financial Advisers, Inc.
Fifth Copley Corp.
Fifth Singleton Corp.
First Income Corp.
Fourth Copley Corp.
Fourth Income Corp.
Fourth Singleton Corp.
Genesis Seguros Generales, Sociedad Anonima De Seguros Y Reaseguros
Graystone Partners, Inc.
Graystone Partners, L.P.
Haco Corp.
Harris Associates, Inc.
Harris Associates, L.P.
Harris Associates Securities, L.P.
Harris Partners, Inc.
Harris Partners L.L.C.
Interbroker, Correduria De Reaseguros, S.A.
Jurika & Voyles, Inc.
Jurika & Voyles, L.P.
Kolon-Met Life Insurance Company

LC Park Place Corporation
Lone Star Industries, Inc.
Loomis, Sayles & Company, Inc.
Loomis, Sayles & Company, L.P.
Luther's Bar-B-Q', Inc.
MC Management, Inc.
MC Management, L.P.
Mecca Software, L.L.C.
Mercadian Capital L.P.
Mercadian Funding L.P.
MetLife International Real Estate Equity Shares, Inc.
MetLife Agricultural Credit Corp.
MetLife General Insurance Agency of Ohio, Inc.
MetLife Healthcare Network of Eastern Pennsylvania
MetLife Healthcare Network of Northeast Florida
MetLife Healthcare Network of Southern Florida
MetLife Healthcare Network of Western Florida
MetLife Independent Financial Services Limited
MetLife Limited Partnership I
Metric Colorado, Inc.
Metric Institutional Apartment Fund II, L.P.
Metropolitan Home Loans Limited
Metropolitan Life Insurance Services Limited
Metropolitan Lloyds Insurance Company of Texas
Metropolitan Structures
Mezzanine Investment Limited Partnership - 2
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Mezzanine Investment Limited Partnership - 6
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Morguard Investments Limited
Nailite International Inc.
NEF Corporation

NEIC Holdings, Inc.
NEIC Operating Partnership, L.P.
New England Funds, L.P.
New England Funds Management, L.P.
New England Investment Associates, Inc.
New England Investment Companies, L.P.
Origenes AFJP, S.A.
Park Avenue Funding Corporation
Perseus Partners L.P.
Pesco Plus, L.C.
Pleiades Partners L.P.
Pt. MetLife Sejahtera
Public Employees Equities Services Company
R&T Asset Management, Inc.
Ralph C. Sutro, Co.
Reich & Tang Asset Management, L.P.
Reich & Tang Distributors, L.P.
Reich & Tang Services, L.P.
Santander Met, S.A.
Second Income Corp.
Seventh Copley Corp.
Sixth Copley Corp.
Sixth Singleton Corp.
Seguros Genesis, S.A. (Spain)
Snyder Capital Management, Inc.
Snyder Capital Management, L.P.
Southern Health Plan Management, Inc.
Southwest Capital Company
Spa Partners L.P.
SSRM Services, Inc.
State Street Research Energy, Inc.
State Street Research Intermediate Bond Fund
State Street Research International Fixed Income Fund
State Street Research Strategic Portfolios: Aggressive
State Street Research Strategic Portfolios: Conservative

State Street Research Strategic Portfolios: Moderate
Stellar Partners L.P.
Third Income Corporation
Third Singleton Corporation
Vaughan, Nelson, Scarborough & McConnell, L.P.
VNSM, Inc.
Westpeak Investment Advisors, Inc.
Westpeak Investment Advisors, L.P.
1038624 Ontario Inc.
161397 Canada Inc.
810597 Ontario Inc.
810660 Ontario Inc.

Respondent Richard Sabo is an individual.

Gary Antonino, Joel Sherman, Ronald Schram, and the United Food Commercial Workers International Union, AFL-CIO, CLC are defendants in this case and are not participating in this petition for certiorari.

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Petitioner Metropolitan Life Insurance Company ("MetLife") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania (App. 1a-12a) has not been officially reported. The Opinion of the United States Court of Appeals for the Third Circuit (App. 15a-41a) is reported at 137 F.3d 185.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1998, and MetLife's timely petition for rehearing with suggestion for rehearing *en banc* was denied on March 31, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, provides as follows:

§1011. Declaration of policy

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

> The business of insurance and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. § 41 *et seq.*], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

The relevant provisions of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, the Pennsylvania Unfair Insurance Practices Act ("UIPA"), 40 Pa. S. § 1171 *et seq.*, and the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("CPL"), 73 Pa. S. § 201-1 *et seq.*, are reproduced in Appendix E.

STATEMENT OF THE CASE

This case presents substantially the same question on which this Court recently granted certiorari in *Humana Inc. v. Forsyth*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303): whether the McCarran-Ferguson Act, which gives the states

preeminent authority to regulate the business of insurance, precludes a federal civil RICO claim where the alleged predicate acts constitute the business of insurance. The case was brought by a former MetLife sales representative who, among other claims, filed suit under RICO, asserting purported predicate acts based on allegedly deceptive insurance sales practices by MetLife in Pennsylvania.[1] (App. 17a).

The district court (Hon. Gary L. Lancaster, U.S.D.J.) granted MetLife's motion to dismiss the RICO claims on the grounds that they were precluded by the McCarran-Ferguson Act. (App. 10a) The Act exempts "the business of insurance" from any federal regulation that would "invalidate, impair, or supersede" state law, unless the federal law at issue "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The district court held that RICO does not specifically relate to the business of insurance, and that for purposes of the McCarran-Ferguson Act the alleged conduct constituted the business of insurance. (App. 5a-10a) Moreover, the district court found that "the Commonwealth of Pennsylvania has enacted 'a comprehensive system of state insurance regulation' intended to occupy the field of regulating the business of

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[1] The alleged predicate acts consist of (i) "churning," by which MetLife allegedly encouraged its sales force to accumulate commissions by inducing policyholders to use cash values in their existing policies to purchase new policies; (ii) a "50/50" insurance plan, which MetLife allegedly advertised as a retirement savings plan; and (iii) intimidation of sales representatives to induce them to participate in these allegedly fraudulent insurance sales activities. (App. 17a). Plaintiff alleged injury in the form of loss of employment and loss of client base. (*Id.*). MetLife does not concede that any of plaintiff's claims have any merit. In fact, in an earlier arbitration proceeding, plaintiff was denied relief on a claim of wrongful termination. *See Sabo v. Metropolitan Life Ins. Co.*, No. 94-307, Magistrate Judge's Report & Recommendation at 7-8 (W.D. Pa. Sept. 10, 1996).

insurance." (App. 10a) (citation omitted). The court recognized that the legislative cornerstone of that regulatory scheme is the Pennsylvania Unfair Insurance Practices Act, 40 Pa. S. § 1171 *et seq.* (the "UIPA"), which prohibits the very type of conduct alleged in plaintiff's RICO claims.[2] (App. 10a)

As the district court noted, the UIPA, unlike RICO, does not provide a private right of action; it is enforceable only by the Pennsylvania Insurance Commissioner.[3] (App. 10a) The UIPA also preserves certain common-law and statutory causes of action that existed when UIPA was enacted. UIPA § 1171.13. Those causes of action, including common-law fraud and Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. S. § 201-1 *et seq.* (the "CPL"), are part of Pennsylvania's legal and regulatory framework governing the business of insurance. Unlike RICO, neither of those causes of action provides for mandatory treble damages or attorneys' fees. The district court concluded that the application of RICO's extraordinary remedies would "invalidate, impair or supersede" Pennsylvania's comprehensive legal and

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[2] *See, e.g.*, 40 Pa. S. §§ 1171.4, 1171.5(a)(1)(i) (prohibiting deceptive trade practices); 1171.5(a)(2) (prohibiting false statements relating to the business of insurance); 1171.5(a)(8) (prohibiting insurance contracts that are not as expressed in the contracts themselves); 1171.5(a)(12) (prohibiting false or fraudulent statements relating to an application for insurance).

[3] Under the UIPA, the Commissioner is authorized to "examine and investigate the affairs of every person engaged in the business of insurance," § 1171.7, to hold administrative hearings, § 1171.8, to impose administrative penalties, including cease and desist orders and suspension or revocation of licences, § 1171.9, and to seek injunctions, § 1171.10. The Commissioner may also seek judicial imposition of civil monetary penalties for knowing violations of the UIPA. *See* § 1171.11.

regulatory system that squarely governs the alleged conduct in this case, and therefore plaintiff's RICO claim was precluded by the McCarran-Ferguson Act. (App. 10a)

The Third Circuit reversed and remanded. The Third Circuit agreed with the district court that (i) RICO does not specifically relate to the business of insurance, (ii) the predicate acts alleged by plaintiff are at the "core" of the business of insurance for McCarran-Ferguson Act purposes,[4] and (iii) Pennsylvania has enacted laws to regulate the business of insurance, including laws governing the type of sales practices alleged as predicate acts in this case. (App. 27a-29a) The Third Circuit, however, concluded that RICO would not "invalidate, impair, or supersede" Pennsylvania's insurance laws and that McCarran-Ferguson Act preclusion thus did not apply.

In reaching that conclusion, the Third Circuit held that the McCarran-Ferguson Act would displace RICO only if RICO *directly conflicts* with a specific substantive provision of Pennsylvania laws governing the business of insurance. (App. 30a-34a) Because the Third Circuit could discern no such conflict, it found no "invalidation, impairment, or supersedence, however defined, of Pennsylvania insurance

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[4] As the Third Circuit explained, "there is nothing more basically 'insurance' than the sale of an insurance contract and the insurer's unique approach in trading, advertising, or valuing that product." (App. 27a) Moreover, plaintiff, who is a former MetLife sales representative, was a "person engaged" in the business of insurance and, therefore, under the McCarran-Ferguson Act is "subject to the laws of the several States which relate to the regulation" of the business of insurance. 15 U.S.C. § 1012(a).

law."[5] (App. 34a) On March 31, 1998, the Third Circuit denied MetLife's petition for rehearing with suggestion for rehearing *en banc*. (App. 42a-43a).

REASONS FOR GRANTING THE WRIT

This petition for certiorari presents substantially the same question with respect to which this Court recently granted certiorari in *Humana Inc. v. Forsyth*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303). That question, on which there is a direct conflict in the Courts of Appeals (as well as the district courts and state courts), concerns an issue of national importance: whether the availability of a civil RICO claim to challenge allegedly deceptive practices in the sale of insurance would, in contravention of the McCarran-Ferguson Act, "invalidate, impair, or supersede" state insurance regulatory schemes that govern the same alleged conduct and provide different -- and discretionary as opposed to mandatory -- remedies.

MetLife respectfully requests that this Court grant certiorari in this case and schedule this case for oral argument on the same day as *Humana*. This case presents the conflict in the Courts of Appeals even more directly and compellingly than *Humana*.[6] Moreover, hearing the two cases together

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[5] The Third Circuit also reinstated a cause of action for defamation. (App. 39a-40a) Although MetLife believes the district court correctly dismissed that claim, the Third Circuit's ruling concerning that claim is not at issue on this certiorari petition.

[6] In his amicus brief recommending a grant of certiorari in *Humana*, the United States Solicitor General stated that *Humana* is not the "ideal vehicle" for resolving the conflict in the Courts of Appeals. According to the Solicitor General, the Ninth Circuit in *Humana* may have based its decision, at least in part, on the incorrect

(continued...)

would give the Court a broader perspective on the issues presented. The two cases arise from different factual circumstances -- the sale of life insurance in this case and the imposition of health insurance co-payments in *Humana*. The two cases also concern the effect of allowing civil RICO claims on the insurance laws of two different states. Consideration of the two cases together would afford the Court a better understanding of the issues presented and aid the Court's resolution of those issues.

The Third Circuit in this case held that the McCarran-Ferguson Act does not preclude application of RICO unless RICO *directly conflicts* with the state insurance regulatory framework. This ruling clashes with the decisions of three other Courts of Appeals (the Eighth, Sixth and Fourth Circuits) holding that the availability of the mandatory RICO remedies of treble damages and attorneys' fees would invalidate, impair, or supersede state insurance regulatory frameworks by *altering the balance* of remedies struck by state law, even if no *direct conflict* exists between state and federal law.

A writ of certiorari is appropriate where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same matter." Sup. Ct. R. 10(a). As the Third Circuit acknowledged, the question presented here "divides sister Courts of Appeals" and is the subject of jurisprudential "disarray."

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[6] (...continued)
assumption that Nevada's insurance statutes do not provide a private right of action. *See* Brief of United States as *Amicus Curiae* at 19, *Humana Inc. v. Forsyth*, No. 97-303 (May 29, 1998). In contrast, Pennsylvania's UIPA clearly does not allow for a private right of action. *See* Point II.B *infra*. Therefore, the possible inadequacy identified by the Solicitor General of *Humana* is not present in the instant case.

(App. 17a, 30a) This conflict in the Courts of Appeals involves important matters of insurance law and federal policy. It concerns the federal invasion of an area generally reserved to the states by Congress, and the risk that imposition of the extraordinary, mandatory federal remedies available under RICO will interfere with the states' ability to regulate the business of insurance.

In enacting the McCarran-Ferguson Act, Congress intended "to restore the supremacy of the States in the realm of insurance regulation." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). With the passage of the UIPA, the Pennsylvania legislature intended to exercise the full authority granted to it by the McCarran-Ferguson Act. *See* 40 Pa. S. § 1171.2 (UIPA was intended to "regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran-Ferguson] act"). Accordingly, the Pennsylvania legislature explicitly intended the UIPA to occupy the field of regulating the business of insurance, free from interference by federal regulation.

In contravention of the clear legislative intent of both Congress and the Pennsylvania legislature, the Third Circuit held that the McCarran-Ferguson Act did not preclude federal regulation through RICO of the conduct alleged in this case, which is at the "core" of the business of insurance. Like the Ninth Circuit in *Humana*, the Third Circuit looked to whether RICO *directly conflicts* with a substantive state law or regulation governing insurance and sustained the RICO claims because it found no such conflict. The restrictive direct conflict analysis applied by the Third Circuit is wrongly imported from the jurisprudence of federal preemption and is contrary to the express language and intent of the McCarran-Ferguson Act. As the Eighth, Sixth, and Fourth Circuits have recognized, the statutory language -- "invalidate, impair, or supersede" -- is far broader and more encompassing than the Third Circuit's narrow

requirement of a direct "conflict," a word that is not found in the McCarran-Ferguson Act.

The Third Circuit's unduly narrow interpretation of McCarran-Ferguson's statutory language so as to allow RICO claims to be superimposed on state insurance laws will cause precisely the type of "federalization" of insurance law that the McCarran-Ferguson Act was designed to prevent and that this Court has expressly condemned. As the Third Circuit acknowledged, appellate "jurisprudence is in disarray as to the extent and meaning of invalidate, impair, or supersede under the Act." (App. 30a). This Court should grant certiorari, as it did in *Humana*, to resolve the significant conflict in the Circuit Courts and to clarify the respective roles of the state and federal governments in regulating the business of insurance.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT IN THE COURTS OF APPEALS ON THE PROPER SCOPE OF McCARRAN-FERGUSON PRECLUSION

In noting the "disarray" in appellate jurisprudence, the Third Circuit observed that Courts of Appeals have adopted conflicting approaches in determining whether the McCarran-Ferguson Act precludes RICO and other federal claims concerning the business of insurance. "One line of cases . . . looks to a direct conflict in the substantive provisions of the federal and state statutes at issue." (App. 30a). The contrary line of cases does not require direct conflict but holds instead that "RICO's expanded remedial framework" can impair, invalidate or supersede state law simply by providing greater

and more extraordinary remedies than are available under a state's insurance regulatory framework. (App. 32a).[7]

The Third Circuit in this case held that there must be a direct "conflict" between a substantive provision of state insurance law and RICO before the McCarran-Ferguson Act would preclude application of the federal statute. Because the Third Circuit could not "see" any such conflict, it found "no invalidation, impairment, or supersedence, however defined, of Pennsylvania insurance law." (App. 34a) The Ninth Circuit in *Humana*, in which this Court recently granted certiorari, also has required a direct conflict between state and federal law to trigger McCarran-Ferguson preclusion. *Humana*, 114 F.3d at 1480; *accord Merchants Home*, 50 F.3d at 1491-92.

In marked contrast to the Third and Ninth Circuits, the Eighth, Sixth and Fourth Circuits have rejected the direct conflict analysis and held that the McCarran-Ferguson Act bars RICO claims relating to the business of insurance. In *Doe v. Norwest Bank*, 107 F.3d 1297, 1307-08 (8th Cir. 1997), the Eighth Circuit concluded that imposing RICO's "extraordinary" civil sanctions of mandatory treble damages and attorneys' fees

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[7] The Third Circuit's categorization of the two contradictory lines of appellate authority combined decisions involving RICO as well as those involving other federal statutes. Only one of the three other Circuit Courts cited by the Third Circuit as adopting the direct conflict standard rendered its decision in a RICO case. *See Merchants Home Delivery Serv., Inc. v. Reliance Group Holdings, Inc.*, 50 F.3d 1486 (9th Cir.), *cert denied*, 516 U.S. 964 (1995); *see also Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998). The other two Circuit Courts' rulings involved different federal statutes. *See Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996) (Federal Deposit Insurance Act); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (Fair Housing Act).

on a state's insurance regulatory framework would "so impair the state law as to bar application of RICO," even in the absence of any "direct conflict" between the federal and state statutes.

Similarly, in *Kenty v. Bank One*, 92 F.3d 384 (6th Cir. 1996), the Sixth Circuit held that allowing RICO claims based on conduct regulated by state insurance law would "impair the regulatory framework within which [the state] expects its insurance companies to do business," by subjecting such conduct to different sanctions and remedial procedures from those the state authorizes. *Kenty*, 92 F.3d at 392. The Sixth Circuit explained that

> [t]he different liability under Ohio law for violations, as well as different standards of proof necessary to demonstrate misrepresentations, means that RICO does impair the ability of Ohio to regulate this type of behavior. In particular, RICO calls for treble damages, which Ohio law does not.

Id.

So, too, in *Ambrose v. Blue Cross & Blue Shield*, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996), *aff'g* 891 F. Supp. 1153 (E.D. Va. 1995), the Fourth Circuit held that the plaintiff's RICO claim was precluded by the McCarran-Ferguson Act. The Fourth Circuit concluded that allowing a RICO action based on conduct regulated by the "Unfair Trade Practices" chapter of Virginia's insurance code "would 'greatly impair the [state regulators'] ability to enforce Virginia's insurance code and, specifically, to secure from insurers settlements that are in the interest of all insureds and in the public interest as well.'" *Ambrose*, 1996 U.S. App. LEXIS 22035, at *4 (quoting *Ambrose*, 891 F. Supp. at 1166). The Fourth Circuit also stated that "because of the dramatic

disparity in the cause of action and remedies available to RICO plaintiffs, RICO would effectively supplant Virginia's chosen system of redress." *Id.*[8]

This pronounced conflict between the Courts of Appeals regarding the application of two important federal statutes merits this Court's attention. The fact that five Courts of Appeals and numerous district courts have disagreed about the relationship of the McCarran-Ferguson Act and RICO in the last three years underscores the significance of this issue. MetLife respectfully submits that this Court should grant certiorari in this case, as it did in *Humana*, to resolve the conflict between the Courts of Appeals and provide guidance to the lower courts and litigants.

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[8] In addition, before the Third Circuit's decision in this case, the majority of Pennsylvania state and federal courts that addressed the issue held that RICO claims are precluded under the McCarran-Ferguson Act. *See, e.g., Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 203-04 (M.D. Pa. 1993); *Senich v. Transamerica Premier Ins. Co.*, 766 F. Supp. 339, 342 (W.D. Pa. 1990); *Richhart v. Metropolitan Life Ins. Co.*, CIV. A. No. 89-1725, 1990 WL 39268, at *2-3 (E.D. Pa., Mar. 30, 1990); *Leckey v. Aetna Cas. & Sur. Co.*, 590 A.2d 1255, 1260 (Pa. Super. Ct. 1991). A substantial number of other federal district courts and state courts have reached the same conclusion. *See, e.g., Espinoza v. Union Sec. Life Ins. Co.*, Civ. A. No. 1:95-cv-453, 1996 WL 380702, at *3-5 (N.D. Ga. Jan. 24, 1996); *Avery v. Schmidt*, Civ. A. No. 93-4079, 1995 WL 562302, at *4-5 (E.D. La. Sept. 20, 1995); *Everson v. Blue Cross & Blue Shield of Ohio*, 898 F. Supp. 532, 542-45 (N.D. Ohio 1994); *American Int'l Group, Inc. v. Superior Court*, 285 Cal. Rptr. 765, 777 (Cal. Ct. App. 1991), *cert. denied*, 504 U.S. 911 (1992).

II. THE THIRD CIRCUIT'S DECISION ALLOWING RICO CLAIMS CONTRAVENES THE PURPOSE AND INTENT OF THE McCARRAN-FERGUSON ACT

The conflict among the Courts of Appeals concerns important matters of insurance law and federal policy: the intrusion of federal law into an area generally reserved to the states, and the interference with the states' ability to regulate the business of insurance that would result from the imposition of mandatory and severe federal RICO remedies. The Third Circuit's decision to allow federal regulation of the business of insurance contravenes the clear mandate of the McCarran-Ferguson Act that such conduct shall be regulated by the states.

The McCarran-Ferguson Act was adopted by Congress specifically in response to *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior to that decision, it had been assumed that "[i]ssuing a policy of insurance is not a transaction of commerce," *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869), and, accordingly, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). "The emergence of an interconnected and interdependent national economy, however, prompted a more expansive jurisprudential image of interstate commerce." *Fabe*, 508 U.S. at 499. In *South-Eastern Underwriters*, the Court held that an insurance company that conducted a substantial part of its business across state lines was engaged in interstate commerce and subject to federal regulation under the Commerce Clause. 322 U.S. at 552-53. "This result, naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe*, 508 U.S. at 499-500.

In response, Congress in 1945 "transformed the legal landscape" by enacting the McCarran-Ferguson Act "to restore

the supremacy of the States in the realm of insurance regulation." *Id.* at 500, 507. As this Court noted in *Fabe*, Congress "achieved this purpose in two ways":

> The first "was by removing obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." The second "was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects."

Id. at 500 (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946)); *see also SEC v. National Securities, Inc.*, 393 U.S. 453, 458, 459 (1969) (before *South-Eastern Underwriters*, "regulation of insurance transactions was thought to rest *exclusively* with the states"; "[t]he McCarran-Ferguson Act was an attempt to turn back the clock" to that regime) (emphasis added).

The broad preclusive effect that the Act is intended to have is clear from its legislative history. As this Court noted in *Fabe*, Senator Ferguson, one of the authors of the Act, explained its intended effect as follows:

> "[w]hat we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its

> wisdom, would act specifically with reference to insurance in enacting the law."

Fabe, 508 U.S. at 507 n.7 (citation omitted).

This Court has expressly recognized that the legislative purpose of the McCarran-Ferguson Act was "to give support to the existing and future state systems for regulating and taxing the business of insurance," *Prudential Ins. Co.*, 328 U.S. at 429, and "to protect state [insurance] regulation . . . against *inadvertent* federal intrusion." *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996) (emphasis in original). Congress intended the McCarran-Ferguson Act to remove the business of insurance from the general operation of its Commerce Clause powers and to restore the prerogative of the states to regulate the business of insurance.

RICO is precisely the type of federal statute of general applicability that the McCarran-Ferguson Act is intended to preclude from applying to conduct which is governed by state insurance laws. RICO is a general Commerce Clause statute designed to address the "burden" on "interstate and foreign commerce" of racketeering enterprise activities. *See* Statement of Findings and Purpose, reprinted in 1970 U.S.C.C.A.N. 1073. The Third Circuit's decision allowing RICO claims impermissibly injects federal law, under the rubric of the Commerce Clause, directly into the core of the regulation of the business of insurance -- an area that Congress expressly shielded from the operation of the Commerce Clause through the McCarran-Ferguson Act.

There is nothing in RICO's legislative history to indicate that it was intended to override the McCarran-Ferguson Act's prohibition on federal intrusion into state regulation of the business of insurance. On the contrary, RICO's purpose is squarely at odds with the McCarran-Ferguson Act's intent to give states the prerogative to establish regulations governing

the business of insurance, as well as appropriate methods of enforcement and penalties for violations of those regulations.

Indeed, Pennsylvania enacted the UIPA to exercise its full regulatory authority under the McCarran-Ferguson Act, to the exclusion of federal regulation. *See* 40 Pa. S. § 1171.2 ("[t]he purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran-Ferguson] act"). The UIPA is designed to "occupy the field of regulating the business of insurance as contemplated by" the McCarran-Ferguson Act. *Black v. Nationwide Mut. Ins. Co.*, 429 F. Supp. 458, 463 (W.D. Pa. 1977), *aff'd mem.*, 571 F.2d 571 (3d Cir. 1978); *see also D'Ambrosio v. Pennsylvania Nat'l. Mut. Casualty Ins. Co.*, 431 A.2d 966, 969 (Pa. 1981) (UIPA is a "dramatic, sweeping effort" to curb bad faith conduct by insurers).[9]

In sum, by allowing RICO claims involving the business of insurance, the Third Circuit has improperly extended the operation of Congress' general Commerce Clause power into an area of state regulation that Congress has carved

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[9] Although the UIPA does not permit private litigants to enforce its provisions (App. 10a), the UIPA does expressly incorporate into its regulatory framework pre-existing common law and statutory causes of action, such as common-law fraud and CPL claims. *See* 40 Pa. S. § 1171.13; *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 58 (3d Cir. 1992). Those causes of action differ significantly from federal RICO and provide discretionary -- as opposed to mandatory -- remedies. Moreover, common law fraud in Pennsylvania requires a substantially higher burden of proof than RICO. *See* Point IV.A *infra*. Significantly, Pennsylvania's state RICO statute, 18 Pa. S. § 911 *et seq.*, does not provide a private right of action and thus is not included in the causes of action made available under the UIPA. *See D'Iorio v. Adonizio*, 554 F. Supp. 222, 232 (M.D. Pa. 1982).

out from the Commerce Clause. Permitting RICO claims in that area would impermissibly federalize insurance litigation, just as the availability of civil RICO claims in other areas "has 'quite simply revolutionize[d] private litigation'" and "'validate[d] the federalization of broad areas of state common law of frauds.'" *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 501 (1985) (Marshall, J., dissenting)). If allowed to stand, the Third Circuit's decision will damage and impair state regulation of the business of insurance, which the McCarran-Ferguson Act was intended to protect.

III. THE THIRD CIRCUIT'S CONFLICT ANALYSIS IS CONTRARY TO THE PLAIN MEANING OF THE McCARRAN-FERGUSON ACT

Like the Ninth Circuit in *Humana*, the Third Circuit in this case looked to whether RICO directly *conflicted* with a specific substantive provision of state law and sustained the plaintiff's RICO claim because it found no such conflict. (App. 30a-34a) This restrictive conflict analysis applied by the Third and Ninth Circuits is flatly inconsistent with the McCarran-Ferguson Act's express language. The test for McCarran-Ferguson preclusion is not whether a "conflict" exists. In fact, that word does not appear in the statute. Rather, under the statutory language, the relevant question is whether application of federal law would in any way "invalidate, impair, or supersede" state law. *See* 15 U.S.C. § 1012(b).

As this Court has observed, "'[t]he starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself.'" *Fabe*, 508 U.S. at 500 (citation omitted). Where the statute does not define its key terms, they must be given their ordinary meaning. *Asgrow*

Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995). And, when words are used in the disjunctive, each must be given its separate meaning. *Garcia v. United States*, 469 U.S. 70, 73 (1984).

Under these standard principles of statutory construction, the terms "invalidate, impair or supersede" cannot be limited to direct "conflicts." A "conflict" between two laws -- for example, where compliance with one precludes compliance with the other -- would undoubtedly result in the "invalidation" of one or the other law. But a law can be "impaired" or "superseded" even where no actual "conflict" exists.

As this Court stated more than a century ago, "the lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate.'" *Edwards v. Kearzey*, 96 U.S. 595, 600 (1877) (citation omitted); *accord Doe*, 107 F.3d at 1308; *see also Black's Law Dictionary* 752 (6th ed. 1990) (defining "impair" as "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner"); *Webster's Third New Int'l Dictionary* 2295 (1986) (the word "supersede" connotes making something "superfluous or unnecessary" by supplanting it with something else). An actual conflict is not required.[10]

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[10] Moreover, section 1012(b) of the McCarran-Ferguson Act includes the proviso that the Federal Trade Commission ("FTC") Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). Evidently, Congress believed that state regulation of insurance trade practices would be adversely affected by a parallel federal system of regulation and therefore excluded insurance sales and advertising practices from federal regulation by the FTC. *See Federal Trade Comm'n v. National Casualty Co.*, 357 U.S. 560, 564 (1958)

(continued...)

The "conflict" analysis applied by the Third and Ninth Circuits inappropriately utilizes principles developed under Supremacy Clause preemption jurisprudence that have no application in the McCarran-Ferguson context. In Supremacy Clause analysis, there is a "strong presumption" against the preemption of state law by federal law and in favor of the application of state law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992). Under Supremacy Clause analysis, preemption is found only if Congress expressly provides that state law is displaced or if state law "actually conflicts with federal law." *Id.* at 516. Viewing the question under the McCarran-Ferguson Act as whether state law actually "conflicts" with and therefore "inversely" preempts federal law improperly incorporates a similar presumption against preemption into the McCarran-Ferguson analysis. The language and history of the McCarran-Ferguson Act do not in any way support a presumption favoring the application of general federal law to the business of insurance. On the contrary, the basic purpose of the McCarran-Ferguson Act is "to reserve to the states the regulation of the 'business of insurance.'" *FMC Corp. v. Holliday*, 498 U.S. 52, 63 (1990).

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[10] (...continued)
(invalidating FTC cease and desist orders regarding insurance advertising where "[e]ach State in question ha[d] enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision"). Section 1012(b)'s proviso prohibiting application of the FTC Act illustrates the broad scope of preclusion that Congress intended under the McCarran-Ferguson Act, as well as Congress' specific judgment that regulation of insurance sales practices (such as are at issue in this case) should be left exclusively to state regulation.

As a result, the importation of Supremacy Clause preemption analysis into McCarran-Ferguson preclusion is fundamentally incorrect -- and inconsistent with the Act's purpose. *See Ambrose*, 891 F. Supp. at 1167 ("[t]he McCarran-Ferguson Act does not admit of [a preemption-type] analysis . . . because the [Act] does not turn on status, i.e., supremacy of a body of law, but on the effect of the law, i.e., whether an act of Congress 'invalidates, impairs or supersedes' certain kinds of state law.").

In applying a conflict analysis to assess McCarran-Ferguson preclusion, the Third Circuit incorrectly relied on this Court's decision in *SEC v. National Securities, Inc.*, 393 U.S. 453, 463 (1969), which held that the McCarran-Ferguson Act did not prevent the SEC from applying the federal securities laws to a merger between two insurance companies that the Arizona Director of Insurance had approved. The Third Circuit incorrectly read that decision as holding that McCarran-Ferguson preclusion does not apply where "any 'impairment'" of state regulation would be only "indirect" where "no true 'conflict' in remedies" exists. (App. 33a). That reading is not supported by the facts or legal analysis in *National Securities*.

National Securities turned on this Court's conclusion that insofar as it protected the interests of shareholders rather than policyholders, the Arizona statute at issue was *not* a "law enacted by [the] State for the purpose of regulating the business of *insurance*," 15 U.S.C. § 1012(b) (emphasis added) -- a precondition for McCarran-Ferguson preclusion. The Court explained:

> [W]e do not believe that a state statute aimed at protecting the interests of those who own stock in insurance companies comes within the sweep of the McCarran-Ferguson Act. Such a statute

> is not a state attempt to regulate "the business of insurance," as that phrase was used in the Act.

National Sec., 393 U.S. at 457; *accord id.* at 460 ("This is not insurance regulation, but securities regulation."). Two competing interests were at stake in *National Securities*: "[t]he paramount federal interest in protecting shareholders" and "the paramount state interest in protecting policyholders." *Id.* at 463.

The need to accommodate two distinct spheres of regulation (one federal, one state) is inapplicable where, as here, only a single sphere -- the one entrusted to the states -- is implicated. This Court cautioned that "[d]ifferent questions would, of course, arise if the Federal Government were attempting to regulate in the sphere reserved primarily to the states by the McCarran-Ferguson Act." *Id.*

The Pennsylvania laws at issue in this case clearly involve only the insurance relationship. (*See* App. 28a ("Nor is it disputed that the applicable Pennsylvania insurance statute is a state law enacted for the purpose of regulating the business of insurance")). Moreover, plaintiff is impermissibly attempting to use RICO to regulate conduct constituting the business of insurance.

In these circumstances, where only one area of regulation is at issue -- the laws governing insurers and their interactions with their policyholders -- the McCarran-Ferguson Act precludes federal regulation. *See National Sec.*, 393 U.S. at 460, 463 ("the relationship between the insurance company and the policyholder" is "the sphere reserved primarily to the States"); *see also Doe*, 107 F.3d at 1307 (noting that, "in contrast to *National Securities*, the federal and state statutes at issue here [RICO and state unfair insurance practices law] are directed toward the *same* end: the protection of policyholders

and prospective policyholders from fraudulent insurance practices") (emphasis added).

IV. THE THIRD CIRCUIT ERRED IN HOLDING THAT RICO'S EXTRAORDINARY, MANDATORY REMEDIES WOULD NOT IMPAIR PENNSYLVANIA INSURANCE LAW

A. RICO Remedies Are Significantly Different from Those Available under Pennsylvania Law

As this Court has recognized, civil RICO "provides for drastic remedies." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 233 (1989). Under RICO, prevailing plaintiffs are entitled to mandatory awards of treble damages and attorneys' fees. *See* 28 U.S.C. § 1964(c). Courts have characterized RICO's remedies as "'among the most severe ever enacted in a federal statute.'" *Doe*, 107 F.3d at 1307 (quoting *Ambrose*, 891 F. Supp. at 1166).

In clear contrast to federal RICO, no Pennsylvania law -- not the UIPA, not common-law fraud, not the CPL, and not the Pennsylvania RICO statute -- awards mandatory treble damages or attorneys' fees to a prevailing plaintiff. As discussed above, neither the UIPA nor Pennsylvania's state RICO statute allows a private right of action. Under Pennsylvania common law, punitive damages in fraud actions are discretionary, not mandatory. They may be awarded only where outrageous conduct is shown. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985) (punitive damages are discretionary and are available only in exceptional circumstances involving outrageous conduct). Pennsylvania common law does not authorize treble damages or attorneys' fees. *See Wexco*, 820 F. Supp. at 203-04 (Pennsylvania "common law actions do not reward plaintiffs with the treble damages. costs and attorneys fees mandated by RICO"). In

addition, a fraud claim under Pennsylvania law has a significantly higher burden of proof and different elements than a federal RICO claim. *Compare Pittsburgh Nat'l Bank v. Larson*, 507 A.2d 867, 869 (Pa. Super. 1996) (fraud requires clear and convincing proof of a material misrepresentation, scienter, justifiable reliance, and proximate cause), *with Crowe v. Henry*, 115 F.3d 294, 296-97 (5th Cir. 1997) (RICO requires proof by a mere preponderance of the evidence of a pattern of racketeering activity and use or investment of income derived therefrom in an enterprise engaged in interstate commerce).

Furthermore, in contrast to RICO, Pennsylvania's CPL does not *mandate* treble (or even double) damages or attorneys' fees. The CPL permits a court, in its *discretion*, to award damages "*up to* three times the actual damages sustained" as well as attorneys' fees. 73 Pa. S. § 201-9.2; *Sewak v. Lockhart*, 699 A.2d. *755* (Pa. Super. Ct. 1997). But a plaintiff must show that he or she is entitled to recover multiple damages and attorneys' fees, and a defendant has the right to argue that such sums are not appropriate. In awarding damages under the CPL, the court's discretion must be guided by principles similar to those governing awards of punitive damages under Pennsylvania common law. *See Johnson v. Hyundai Motor Am.*, 698 A.2d 631, 639-40 (Pa. Super. Ct. 1997) (in deciding whether to award damages under the CPL, the court should consider the outrageousness of the defendant's conduct and other factors relevant to punitive damages), *appeal denied*, 1998 Pa. LEXIS 434 (Pa. Mar. 12, 1998).

In short, RICO's remedial provisions impose extraordinary mandatory penalties that have no counterpart under Pennsylvania statutory and common law.

B. The Extraordinary Federal Remedies Provided by RICO Would Undermine State Insurance Regulation

In *Doe*, the Eighth Circuit made clear that a civil RICO claim, with its severe, mandatory remedies, could wreak "potential havoc" on a state's "carefully considered mechanism for regulating insurance companies." *See United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir. 1997) (discussing *Doe*). Allowing private litigants to seek mandatory treble damages and attorneys' fees under RICO, as the Third Circuit has done, would impair the balance that Pennsylvania law seeks to strike among the many concerns and interests underlying insurance regulation.

This Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), recognized "a State's legitimate interests in punishing unlawful conduct and deterring its repetition" within its borders. *Gore*, 517 U.S. at 568. The Pennsylvania Supreme Court has made clear that Pennsylvania's UIPA is a "legislatively-created regulatory scheme" that represents a legislative policy determination regarding the appropriate sanctions required to deter deceptive insurance sales practices. *See D'Ambrosio*, 431 A.2d at 970. That regulatory framework and Pennsylvania's legislative policy determinations would be impaired and invalidated by allowing RICO claims based on conduct regulated by the UIPA, such as the alleged sales practices at issue here. *Cf. SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 68 (1959) (in McCarran-Ferguson Act case, noting this Court's longstanding "reluctance to disturb the state regulatory schemes that are in actual effect, either by

displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements").[11]

Courts have expressly recognized the adverse effect RICO claims would have on the states' ability to regulate insurance transactions. In *Wexco*, the court held that allowing RICO claims would "upset the balance of relationships between insurance entities and insureds which are established and regulated by [UIPA] and . . . other [Pennsylvania] state laws." *Wexco*, 820 F. Supp. at 204; *see also Doe*, 107 F.3d at 1307-08.

Another "concern" articulated by the courts is that "wronged policyholders would turn to RICO suits instead of pursuing administrative channels of relief." *Blumeyer*, 114 F.3d at 768 (citing *Doe*, 107 F.3d 1306-07). In *D'Ambrosio*, the Pennsylvania Supreme Court emphasized that "'[s]tate insurance departments are intended to serve the public and handle complaints from insureds as to insurer practices on a regular basis.'" 431 A.2d at 970 (citation omitted). Allowing plaintiffs to recover treble damages and attorneys' fees pursuant to RICO would circumvent and undermine the Pennsylvania regulatory enforcement framework. It would encourage persons with complaints about insurance practices to run to the courthouse, rather than turn to the state insurance department for redress (thus hampering the department's ability to investigate). Moreover, in cases where the Pennsylvania

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[11] The Third Circuit's requirement of a "conflict" between "substantive" provisions of state and federal law disregards the clear recognition by this Court that a difference between the state and federal law in procedures, methods or remedies can significantly impair the functioning of a law or regulatory framework. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (even if a state and a federal statute have the same "ultimate goal," preemption may be found if one statute "interferes with the methods" by which the other was designed to reach this goal).

Insurance Commissioner had already made a determination as to an appropriate penalty, a private litigant could impose additional penalties in the form of mandatory treble damages and attorneys' fees under RICO -- a result that nullifies the statutory discretion vested in the Commissioner by the Pennsylvania legislature.[12] As the court explained in *Ambrose*, 891 F. Supp. at 1165:

> [t]he prospect of treble damages and attorneys fees would weaken, diminish and do serious injury to, if not nullify, [the state regulatory scheme] . . . . It would convert a system of public redress into a system of private redress.

Accord Blumeyer, 114 F.3d at 768; *Doe*, 107 F.3d at 1306-07; *Espinoza*, 1996 WL 380702, at *4.[13]

Moreover, allowing RICO claims in the insurance context would frustrate and impair Pennsylvania's regulatory goal of ensuring the financial stability of insurance companies that sell policies to state residents. *Cf. Fabe*, 508 U.S. at 513 (Kennedy, J., dissenting) (noting that all policyholders "have a vital interest in the financial strength and solvency of their insurers"). Pennsylvania, like nearly all states, has detailed, comprehensive regulations governing the financial condition of insurers doing business in the state. Those regulations require

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[12] In fact, in 1994, the Pennsylvania Insurance Department conducted a Market Conduct Examination that addressed many of the alleged insurance sales issues that plaintiff has brought before the federal court with his RICO claim. (App. 7a).

[13] Courts have also expressed concern that the availability of RICO claims would impair state regulation because an insurer that found itself the subject of an inquiry by a state insurance department might be less cooperative for fear of prejudicing its litigation position if a RICO suit should later arise. *See Doe*, 107 F.3d at 1307.

every insurance company to have sufficient capital on hand to ensure the company's ability to pay benefits to policyholders. *See* 40 Pa. S. §§ 71-72. Allowing RICO claims by policyholders based on sales practices such as those alleged as predicate acts in the present case would impermissibly frustrate such Pennsylvania regulations by subjecting insurance companies to potentially huge, unpredictable awards of mandatory treble damages and attorneys' fees based on a different standard of proof than state law would require. Moreover, permitting RICO claims against a mutual life insurance company in particular would benefit the plaintiffs at the expense of other policyholders, who are the owners of the company and the value of whose policies depends on the financial condition of the company.[14]

In sum, the Third Circuit's decision to permit RICO claims would manifestly impair Pennsylvania's regulatory framework in direct contravention of the McCarran-Ferguson Act.

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[14] *See Commonwealth ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950) (a mutual insurance company "is a cooperative enterprise wherein the policyholders, as members, are both insurer and insured"); *Rowen v. Le Mars Mutual Ins. Co.*, 282 N.W.2d 639 (Iowa 1979) (vacating award of punitive damages against mutual insurance company, where punitive damages would fall on innocent policyholders).

CONCLUSION

The petition for a writ of certiorari should be granted, and this case should be scheduled for oral argument on the same day as *Humana Inc. v. Forsyth*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303).

Respectfully submitted

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APPENDIX A – DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 4, 1995

Richard SABO, Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY, Gary Antonino, Joel Sherman, Ronald Shram and The United Food and Commercial Workers International Union, AFL-CIO, CLC, Defendants.

No. Civ. A. 94-307.

United States District Court, W.D. Pennsylvania

January 4, 1995

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MEMORANDUM ORDER

LANCASTER, District Judge.

On March 17, 1994, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(l)(A) and (B), and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on November 10, 1994, recommended that the motions to dismiss Counts I, II and III of the complaint filed by defendants Sherman (Docket # 3), Metropolitan Life Insurance Company (Docket # 9), Shram (Docket # 20), and Antonino (Docket # 22) be granted, that plaintiff's motion to amend the complaint (Docket # 29) be denied, and that plaintiff's motion for leave to take the deposition of Gary Antonino in support of plaintiff's reply to the motion to dismiss (Docket # 39) be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel by first-class mail on November 10, 1994. Objections were filed by plaintiff on November 21, 1994 (Docket # 44). On November 30, 1994, defendant Joel Sherman's opposition to plaintiff s objections was filed (Docket # 45), on December 5, 1994, defendant Metropolitan Life Insurance Company filed a brief in opposition to plaintiff's objections (Docket # 46), on December 5, 1994, defendant Gary Antonino filed a response to plaintiff's objections (Docket # 47), and on December 21, 1994, dcfendant Ronald Shram's opposition to plaintiff's objections was filed (Docket # 48). After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 4th day of July, 1995;

IT IS HEREBY ORDERED that the motions to dismiss Counts I, II and III of the complaint filed by defendants Sherman (Docket # 3), Metropolitan Life Insurance Company (Docket # 9), Shram (Docket # 20), and Antonino (Docket # 22) are granted, that plaintiff's motion to amend the complaint (Docket # 29) is denied, and that plaintiff's motion for leave to take the deposition of Gary Antonino in support of plaintiff's reply to the motion to dismiss (Docket # 39) is denied.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated November 10, 1994 (Docket # 43), is adopted as the opinion of the court.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

BENSON, United States Magistrate Judge.

I. RECOMMENDATION

It is respectfully recommended that the motions to dismiss Counts I, II and III of the complaint filed by defendants Sherman (Docket # 3), Metropolitan Life Insurance Company (Docket # 9), Shram (Docket # 20), and Antonino (Docket # 22) be granted, that plaintiff's motion to amend the complaint (Docket # 29) be denied, and that plaintiff's motion for leave to take the deposition of Gary Antonino in support of plaintiff's reply to the motion to dismiss (Docket # 39) be denied.

II. REPORT

This is an action filed by a former employee of defendant Metropolitan Life Insurance Company (Met Life). Plaintiff alleges that he was retaliated against by Met Life, through its employees Antonino, Sherman and Shram, for opposing schemes to defraud Met Life policyholders which "churning" schemes were perpetrated by Met Life through the individual defendants. The complaint is in seven counts. The first three counts allege violations of the Racketeer Influenced

and Corrupt Organizations Act (RICO) on the part of all defendants save the United Food and Commercial Workers International Union, AFL-CIO, CLC (the Union). The fourth count alleges a violation of the National Labor Relations Act (NLRA) against Met Life and the Union arising from the denial of a grievance filed by plaintiff. The fifth count alleges defamation on the part of Met Life through its agents. This is said to have occurred on August 24, 1993, when Met Life presented a videotape to its employees regarding the churning allegations made by plaintiff, and in which plaintiff alleges he was compared to the character "Slimer" in the movie "Ghostbusters." The sixth count alleges that Met Life agents called plaintiff's customers in the last half of 1993 and informed them that plaintiff was a "thieving son of a bitch." The final count contains allegations against Met Life of intentional interference with contractual relations in that Met Life is said to have stopped two potential customers from purchasing insurance from plaintiff.

Defendant Joel Sherman has filed a motion to dismiss asserting that plaintiff's RICO claims are precluded under the McCarran-Ferguson Act, and that the RICO claims should be dismissed for failure to state a claim. Defendant Met Life has filed a motion to dismiss the RICO claims asserting that plaintiff has failed to state a claim under any of the three sections relied upon in the complaint. Defendant Ronald Shram has filed a motion to dismiss plaintiff s RICO claims on grounds similar to defendant Sherman's motion. Defendant Antonino has filed a motion to dismiss plaintiff's RICO claims advancing arguments similar to those made by defendant Sherman.

Plaintiff has responded to the motions to dismiss, and they are ripe for disposition. Plaintiff has filed a motion for leave to amend the complaint in certain particulars set forth in his RICO case statement with respect to counts I-III. Defen-

dants oppose the amendment asserting that it would be futile. Plaintiff also seeks permission to conduct discovery in order to more fully respond to the motions to dismiss. Defendants oppose this motion also.

PRECLUSION UNDER McCARRAN-FERGUSON

The first issue to be addressed in this case is whether plaintiff may maintain his RICO claims in light of the McCarran-Ferguson Act, and specifically 15 U.S.C. § 1012 which provides as follows:

> § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948
>
> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of several States which relate to the regulation or taxation of such business.
>
> (B) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; Provided, That after June 30, 1948 . . . the Sherman Act, and . . . the Clayton Act and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Thus, as of the effective date of the Act, "[i]f Congress intended to invoke its Commerce Clause powers to occupy part

of the field of insurance regulation, it would expressly say so." *Cochran v. Paco, Inc.*, 606 F.2d 460, 463 (5th Cir. 1979) (addressing McCarran's preclusion of actions under the Truth in Lending Act).

There is a four-part test for preclusion of a federal action pursuant to the McCarran-Ferguson Act, and a finding of preclusion is warranted if:

> (1) the federal statute under which the allegedly precluded action is brought (here, RICO) does not specifically relate to the 'business of insurance'; (2) the complained-of activities constitute the 'business of insurance'; (3) the relevant state has enacted laws for the purpose of regulating these complained-of activities; and (4) the application of the federal statute would 'invalidate, impair or supersede' such state laws.

Wexco, Inc. v. IMC, Inc., 820 F. Supp. 194, 198 (M.D. Pa. 1993) (citing *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 826 (N.D. Cal. 1992), and *Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir.1979)).

First, it is clear that RICO does not specifically relate to the business of insurance. Hence, the first part of the test for preclusion is met.

Plaintiff vigorously contests, however, that the actions complained of in this case constitute the "business of insurance." The complaint contains allegations of a "churning" scheme devised by defendant Antonino by which Met Life customers who had cash surrender values in their existing policies were induced by inaccurate information to purchase new insurance by using the cash surrender value of the old policy to fund the new policy. It is alleged that Met Life was able to turn large profits in this fashion, while imparting no

benefit to its clients.[1] Plaintiff alleges that he refused to take part in the practice, and referred one of his customers who had been "churned" to the Pennsylvania Insurance Commission. It is alleged that, as a result of his actions in opposition to the practice begun by Antonino, he was denied commissions, had some of his clients taken from him, was intimidated, transferred and then terminated by Met Life. Plaintiff also alleges that Met Life engaged in a "50/50" scheme whereby life insurance was sold to groups disguised as retirement accounts. Finally, plaintiff alleges that Met Life encouraged agents to participate in these two schemes, and punished those who would not.

Plaintiff is correct when he notes that not all activities of an insurance company involve the "business of insurance."

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement--these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder.

Securities & Exchange Commission v. National Securities, Inc., 393 U.S. 453, 460, 89 S. Ct. 564, 21 L. Ed.2d 668 (1969). The Supreme Court has offered more particular assistance in settling this question:

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[1] In fact, the Pennsylvania Insurance Commission investigated the practice and eventually imposed a substantial fine on Met Life.

> [T]hree criteria relevant in determining whether a particular practice is part of the 'business of insurance' [are] . . . first, whether the practice has the effect of transferring or spreading the policy-holder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself . . . .

Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 73 L. Ed.2d 647 (1982).

As can be seen, the underlying racketeering activity in this case involves the promotion and sale of insurance policies to Met Life customers, practices one would necessarily have to identify as part of the business of selling insurance. Plaintiff, however, is alleging fraud on the part of defendants. He asserts that fraud is not the business of insurance. *See, e.g., Thacker v. New York Life Ins. Co.*, 796 F. Supp. 1338 (E.D. Cal.1992) (The defendants induced the insured to purchase insurance through misrepresentations concerning the price of the policy. Further there was continuing fraud in using dividends from the policy to pay the difference between the true cost and the purported cost. The court held that, although these are activities which are usually encompassed within the business of insurance, the actions should be characterized as mail fraud, which is not the business of insurance). This approach, however, has been criticized as an exception that would swallow the rule:

> When a plaintiff invokes an action under a federal law against insurance entities, it is presumably because the plaintiff believes that the entities have acted improperly, in violating

> that law. Limiting the court's McCarran-Ferguson examination of those entities' activities to their wrongful character is inconsistent with the existence of Supreme Court precedent directing courts on the proper explanation to make in such circumstances. [Footnote omitted]. Given that wrongful conduct is always alleged, an approach that concludes that wrongful conduct is never the 'business of insurance' would leave no occasion for the courts to apply the principles that the Supreme Court has provided. To say that 'fraud is never the business of insurance' is to start down that road.

Wexco, supra at 201. Indeed, the entire purpose of the McCarran-Ferguson Act is to provide the states with the opportunity to regulate insurance within their borders. Part of that regulation in Pennsylvania relates specifically to the prevention of the very type of fraud alleged in this case. 40 Pa.C.S. §§ 1171.4, 1171.5(a)(l)(i) (deceptive trade practices), 1171.5(a)(2) (making or publishing false statements with respect to business of insurance), 1171.5(a)(8) (permitting or offering an insurance contract that is other than as expressed in the contract itself), and 1171.5(a)(12) (making false or fraudulent statements about or relative to an application for an insurance policy). The existence of the test set forth by the Supreme Court and the purpose of the Act itself counsel against any such sweeping exception for fraudulent conduct. *Accord, Senich v. Transamerica Premier Ins. Co.*, 766 F. Supp. 339, 341 (W.D. Pa. 1990) (mail fraud act does not refer to business of insurance and, like RICO, is not exempt from the McCarran-Ferguson Act). Hence, the underlying RICO activities alleged here, the schemes to defraud policyholders, arose during the practice of the "business of insurance" as that term has been defined by the Supreme Court.

With respect to the third factor, I do not understand plaintiff to challenge the fact that the Commonwealth of Pennsylvania has enacted "a comprehensive system of state insurance regulation" intended to occupy the field of regulating the business of insurance. *Wexco, supra* at 202; *Senich, supra* at 340-41. This factor also weighs in favor of preclusion.

Finally, with respect to the invalidation, supersession or impairment of state regulatory laws, the Commonwealth of Pennsylvania has enacted the Pennsylvania Unfair Insurance Practices Act (PUIPA), 40 Pa.C.S. § 1171, *et seq.* (1992). As noted earlier, the PUIPA provides a mechanism for regulating the exact type of conduct alleged in this case. Furthermore, Pennsylvania has determined that there is no private cause of action for such practices, and has vested enforcement powers in the Commonwealth's Insurance Commissioner. The availability of a federal private action based upon the alleged activities in this case would nullify the state's chosen regulatory remedies for insurance entity misconduct. *Wexco, supra; Senich, supra.*

All four of the factors set forth by the Supreme Court as a test for preclusion under the McCarran-Ferguson Act are met in this case. Plaintiff's RICO claims are, therefore, barred.[2]

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[2] Plaintiff notes that he is not suing as the insured in this case, and that his allegations should therefore survive. The RICO claims, however, are based solely on the existence of a RICO enterprise engaged in fraud against insurance customers. Plaintiff's claims are reliant upon the schemes to defraud, and are as much a part of the "business of insurance" as claims made by an insured.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

Plaintiff seeks leave to amend the complaint, and specifically the RICO counts contained therein, to add various allegations concerning knowledge and acquiescence on the part of Met Life to the actions allegedly taken by defendant Antonino and others. In considering a motion to amend a complaint, the court should consider whether the amendment would be futile. *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 519 (3d Cir.1988). Put another way, if the proposed amendment would not survive a motion to dismiss, the court may deny leave to amend. *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937, 104 S. Ct. 348, 78 L. Ed.2d 314 (1983). Plaintiff's new allegations would have no bearing on the McCarran-Ferguson analysis. Hence, the amendment would not cause plaintiff's RICO claims to survive a motion to dismiss, and the motion to amend should be denied.

PLAINTIFF'S MOTION FOR LEAVE TO DEPOSE DEFENDANT ANTONINO

Plaintiff has also filed a motion to depose defendant Antonino in order to develop a factual record for the court with respect to the motions to dismiss his RICO claims for failure to state a claim. This court has found it unnecessary to reach the 12(b)(6) motion, having concluded that it lacks subject matter jurisdiction. Hence, plaintiff's motion should be denied as moot.[3]

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[3] It should also be noted that a ruling on a motion to dismiss for failure to state a claim cannot rely on matters outside of the pleadings. Reliance on such matters would cause the motion to be converted into a motion for summary judgment. Rule 12. Hence, even if a deposition were taken, it would not be relevant to the

(continued...)

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motions to dismiss Counts I, II and III of the complaint filed by defendants Sherman (Docket # 3), Metropolitan Life Insurance Company (Docket # 9), Shram (Docket # 20), and Antonino (Docket # 22) be granted, that plaintiff's motion to amend the complaint (Docket # 29) be denied, and that plaintiff's motion for leave to take the deposition of Gary Antonino in support of plaintiff s reply to the motion to dismiss (Docket # 39) be denied.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(l)(B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report.

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[3] (...continued)
motions before the court.

APPENDIX B – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 23, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

96-3663

RICHARD SABO,

Appellant

v.

METROPOLITAN LIFE INSURANCE COMPANY, GARY ANTONINO, JOEL SHERMAN, RONALD SCHRAM, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC.

Appeal from the United States District Court for the
Western District of Pennsylvania
D.C. No.: 94-cv-00307
District Judge: The Honorable Donetta W. Ambrose

Before: STAPLETON, ALITO and SEITZ, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on October 16, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court dismissing plaintiff's RICO claim is reversed, the order denying plaintiff's motion to amend the complaint is vacated. The order of the District Court granting MetLife's motion for summary judgment on the plaintiff's defamation claim is reversed to the extent it was based on the ground relied on by the District Court. The opinion of the Court is without prejudice to a consideration by the District Court of other asserted grounds, if any, for summary judgment. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: Feb. 23, 1998

APPENDIX C – DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 23, 1998

Filed February 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3663

RICHARD SABO

Appellant

v.

METROPOLITAN LIFE INSURANCE COMPANY, GARY ANTONINO, JOEL SHERMAN, RONALD SCHRAM; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 94-cv-00307)

Argued October 16, 1997

Before: STAPLETON, ALITO and SEITZ. *Circuit Judges.*

(Opinion Filed: February 23, 1998)

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OPINION OF THE COURT

Seitz. *Circuit Judge.*

This appeal primarily presents an issue that divides sister Courts of Appeals and is of first impression in our court – namely, whether the McCarran Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994) ("The Act"), precludes a cause of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994), where the challenged predicate acts arise out of the defendant's insurance business. The district court exercised jurisdiction over plaintiff's federal claims pursuant to 28 U.S.C. § 1331 and over supplemental state tort claims under 28 U.S.C. § 1367. Our appellate jurisdiction arises under 28 U.S.C. § 1291 to review the district court's final orders.

I. Factual Background

The Metropolitan Life Insurance Company ("MetLife") terminated the employment of Richard Sabo as an insurance sales agent in alleged retaliation for his refusal to participate in illegal trading activity. Mr. Sabo ("Plaintiff") then sued MetLife and several MetLife employees ("Antonino", "Sherman", and "Schram") in the district court, alleging causes of action under RICO as well as a claim based on the common law tort of defamation. In particular, the complaint recited the existence of three predicate acts under RICO: (1) a "churning" scheme, whereby MetLife encouraged and coerced agents to fraudulently trade insurance policies in order to accumulate commissions and decrease the value of outstanding policies; (2) a "50/50" insurance plan that MetLife fraudulently advertised as a retirement savings plan; and (3) an organized policy of intimidation and harassment by MetLife management directed toward its insurance agents to participate in these fraudulent activities.

The district court first granted a motion by all defendants to dismiss the RICO claims on the ground that the McCarran-Ferguson Act precluded such claims where the

causes of action arose from MetLife's insurance business. At the close of discovery, the district court, under a summary judgment standard, dismissed the remaining defamation action on the ground that the alleged defamatory statements were not sufficiently directed toward the plaintiff so that a jury could reasonably conclude that they referred to him. Plaintiff now appeals these two orders.

II. The McCarran-Ferguson Act

Because the central issue in plaintiff's RICO claims implicates an application of the McCarran-Ferguson Act, we turn first to that Act. Our standard of reviewing the district court's grant of a motion to dismiss is plenary. *Chester County Intermediate Unit v. Pennsylvania Blue Shield.* 896 F.2d 808. 810-811 (3d Cir. 1990).

Section 2 of the Act, codified at 15 U.S.C. § 1012, reads as follows:

> **Regulation by State law: Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948**
>
> **(a) State regulation.** The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation.** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as

> amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

The stated purposes of the Act, as expressed in section 1, are to leave regulation and taxation of the insurance business to the states and to ensure that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C § 1011.

In considering the defendants' motion to dismiss the RICO claims, the district court adopted a four-part test announced in *Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 198 (M.D. Pa. 1933) which provides that the McCarran-Ferguson Act precludes federal litigation if:

> (1) the federal statute under which the allegedly precluded action is brought . . . does not specifically relate to the "business of insurance"; (2) the complained-of activities constitute the "business of insurance"; (3) the relevant state has enacted laws for the purpose of regulating these complained-of activities; and (4) the application of the federal statute would, "invalidate, impair(,) or supersede" such laws.

Applying this test, the district court held that RICO does not specifically relate to the business of insurance, thus satisfying the first element of preclusion. As to the second element, the district court found that the plaintiff's complained-of activities did indeed constitute activity within the "business of insurance." Although plaintiff's complaint alleged fraud and

coercion under RICO, the district court reasoned that the defendants' "underlying activity" involves the "promotion and sale of insurance policies to MetLife customers," which is central to the insurance business. Next, the district court found that Pennsylvania had enacted a comprehensive system of insurance regulation so that the third element of the preclusion analysis was met. Finally, the district court held that the application of RICO in an insurance context would "invalidate, impair, or supersede" Pennsylvania's insurance laws. The court arrived at this conclusion by comparing the remedial provisions of civil RICO (namely treble damages, attorney's fees, and costs) with Pennsylvania's insurance laws primarily providing for administrative remedies. It thus reasoned that all the elements of preclusion under the McCarran-Ferguson Act were satisfied which mandated a dismissal of the plaintiff's RICO claims.

The parties to this appeal focus their arguments on two rulings of the district court. First, they disagree as to the scope of the "insurance business" covered by the statute, and whether it applies to the conduct alleged in the complaint. Plaintiff emphasizes that the alleged predicate acts of racketeering activity stem from systematic behavior of "coercive and intimidating tactics" and thus cannot be construed to embrace the business of insurance. Defendants, on the other hand, assert that plaintiff's complaint necessarily relates to the insurance business because it attacks the heart of the insurance industry – specifically, how MetLife manages the licensing of its agents, the agents' authority to solicit insurance, and how agents receive commissions.

Second, both sides contest the proper construction of the "invalidate, impair, or supersede" phrase in 15 U.S.C. § 1012(b) quoted above. Plaintiff urges this court to adopt a "direct conflict" test, in which a federal statute would not "invalidate, impair, or supersede" a state law unless the federal

legislation directly conflicts with substantive duties governed by state insurance law. Conversely, the defendants argue that any analysis of the Act's impairment should not focus on substantive conflict but instead should compare the plaintiff's broad federal RICO remedies with the exclusively administrative scheme adopted under Pennsylvania insurance laws. We will address these two arguments in turn.

A. Preclusion Analysis Under the McCarran-Ferguson Act

As with any other issue of statutory construction, the starting point in the Act's interpretation is the language of the statute itself. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). Section 2(a) of the statute, by its terms, affirmatively subjects the business of insurance to state regulation. 15 U.S.C. § 1012(a). The statute then takes the further step of proscribing unintended federal interference of state insurance laws by a general mandate that no federal law "shall . . . invalidate, impair, or supersede" any state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). This preclusionary mandate does not apply when the federal statute in question "specifically relates to the business of insurance," in which case normal supremacy rules control and the federal statute trumps conflicting state law.[1]

The Supreme Court has extensively reviewed the Act's legislative history, *see, e.g., United States Dep't of the Treasury*

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[1] Because the plaintiff's complaint is not grounded in federal antitrust laws, we focus our analysis on the first clause of section 1012(b). As the Supreme Court noted, the language of the Act distinguishes preclusion analysis where antitrust laws are at issue. *United States Dep't of the Treasury v. Fabe*, 508 U.S. 491, 504 (1993).

v. Fabe, 508 U.S. 491, 499-500 (1993), *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 458-59 (1969), and has fully explained the legislative intent behind the statute's preclusionary approach to federal intrusion on state insurance laws:

> [C]ongress purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946) (footnote omitted); *see also Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033, 1038-39 (3d Cir. 1988).

If it is determined that the alleged conduct at issue broadly constitutes the "business of insurance," and is therefore subject to state regulation under section 1012(a), the next issue is whether the anti-preemption mandate of section 1012(b) precludes a federal cause of action. Here, the statute makes clear that a party is barred from suing under federal law if three distinct requirements are met. First, the federal law at issue does not "specifically relate" to the business of insurance. Second, the state law regulating the challenged conduct was "enacted for the purpose of regulating the business of insur-

ance." Finally, an application of federal law would "invalidate, impair, or supersede" such state law.[2] *Fabe,* 508 U.S. at 501.

The threshold question in determining whether the anti-preemption mandate of 15 U.S.C. § 1012(b) applies is whether the challenged conduct broadly constitutes the "business of insurance" in the first place. 15 U.S.C. § 1012(a). If the contested activities are wholly unrelated to the insurance business, then the McCarran-Ferguson Act has no place in analyzing federal regulation because only when "[insurance companies] are engaged in the 'business of insurance' does the act apply." *National Securities,* 393 U.S. at 459-60.

In addressing the issue of preclusion under § 1012(b), we read no more into the statute than what it says: unless a federal law specifically relates to the business of insurance, it will not be applied when it "invalidates, impairs, or supersedes"

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[2] We note at the outset that federal courts have seemingly disagreed as to the proper analytic inquiry into McCarran-Ferguson Act preclusion. *See, e.g., Dornberger v. Metropolitan Life Ins. Co.* 961 F. Supp. 506, 516 n. 4 (S.D.N.Y. 1997); *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.* 891 F. Supp. 1153, 1158 n. 4 (E.D. Va. 1995), *aff'd,* 95 F.3d 41 (4th Cir. 1997) (unpublished per curiam). Some courts draw upon a four-part inquiry similar to that used by district court and the *Wexco* court. *See Kenty v. Bank One, Columbus, N.A.* 92 F.3d 384, 391-92 (6th Cir. 1996); *American-Deposit Corp. v. Schacht,* 84 F.3d 834, 838-43 (7th Cir. 1996); *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.,* 50 F.3d 1486, 1489 (9th Cir. 1995); *Cochran v. Paco, Inc.* 506 F.2d 460, 464 (5th Cir. 1979). Other courts have announced a more truncated three-part test that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance. *See Doe v. Norwest Bank Minn.* 107 F.3d 1297, 1305 n. 8 (8th Cir. 1997); *United States v. Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616, 619 (1st Cir. 1996). Because of this apparent divergence, it is important to discuss our analysis in detail.

a state law "enacted for the purpose of regulating the business of insurance." If the defendant's conduct does not constitute "the business of insurance," then the Act simply does not apply and there is no need to confront preclusion issues under § 1012(b). We cannot imagine how section 1012(b) protects a state law enacted for the purpose of regulating the insurance business when the activity in question does not relate to insurance. To hold otherwise would require us to abandon the structure and purpose of the McCarran-Ferguson Act.

Our reading of the Act is amply supported by its legislative history and Supreme Court precedent. As explained by the Supreme Court:

> The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the business of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business . . . The selling and advertising of policies, and the licensing of companies and their agents are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which [the Court has previously held] was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement - these were the core of the "business of insurance." Undoubtedly, other activities of

> insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was - it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

National Securities, 393 U.S. at 459-60 (citations omitted). Thus, under § 1012(a), the Act initially recognizes that regulating the "business of insurance" rests in the hands of the states.

Of these state "laws relat[ing] to the regulation or taxation" of the insurance business, 15 U.S.C. § 1012(a), the next subsection protects from federal preemption a special class of state laws "enacted . . . for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). But as explained by the Supreme Court, the categories of laws protected by § 1012(b) "necessarily encompasses more than just the 'business of insurance'" and include those laws that possess the "'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe,* 508 U.S. at 505 (citation omitted). The focus of section 1012(b) is not directed toward the business of insurance itself, but rather toward a certain subset of laws relating to insurance regulation under section 1012(a). That demarcation line is found in § 1012(b) as laws "enacted . . . for the purpose of regulating the business of insurance." Thus, even though the state has a law regulating the challenged activity a court must still address whether that law was meant to fall within the ambit of the Act's protection. This is achieved by deciding whether the activity in question constitutes the business of insurance and whether the specific state law was enacted with the "end, intention, or aim of

adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505.

B. Application of the McCarran-Ferguson Act

We first ask whether the challenged activity alleged in the complaint constitutes the "business of insurance" in order to determine whether the Act applies. The Supreme Court has provided guidance as to what conducts falls within "business of insurance" for purposes of the McCarran-Ferguson Act. In *National Securities*, the Court held that the core of the insurance business "centers around the contract of insurance." 393 U.S. at 460. The Court further set forth typical activity that would unquestionably constitute the business of insurance: "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." *Id.*

Similarly, in *Group Life & Health Ins. Co. v. Royal Drug Co.*, the Supreme Court formulated a three part inquiry in interpreting the phrase "business of insurance" (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry. 440 U.S. 205, 211-21 (1979); *see also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). While this inquiry was directed to the antitrust clause in section 1012(b), it may nevertheless provide guidance in a more generalized analysis under this Act. *See Fabe*, 508 U.S. 503-504.[3]

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[3] Some courts have concluded that this three part test is simply not relevant in determining what constitutes the business of insurance in a non-antitrust context. *See, e.g. Doe*, 107 F.3d at 1305 n.8. (continued...)

In this case, we agree with MetLife and its named employees that their activity constitutes the business of insurance. The challenged conduct appearing in the plaintiff's complaint unquestionably centers around the insurance contract, and specifically the activities surrounding its sale and marketing. MetLife's "50/50 plan," "churning" trades, and management's organized intimidation of sales agents, all strike at the insurance business "core" enumerated in *National Securities* because they directly impact on the sale of insurance policies and ultimately affect the relationship between insurer and insured. 393 U.S. at 460. Indeed, whatever the precise contours of the insurance business phrase may be, there is nothing more basically "insurance" than the sale of an insurance contract and the insurer's unique approach in trading, advertising, or valuing that product. We need not delve into a sophisticated three part analysis under *Royal Drug* or *Pireno* to reach this conclusion, but instead look to the defendants' conduct to ascertain whether it centers around the contract of insurance and the relationship between insurer and insured.

Plaintiff's assertion that the challenged activity cannot constitute the business of insurance because it is illegal is unpersuasive. By pointing to a practice that may violate federal law, and claiming that it is not the "business of insurance," plaintiff demonstrates a fundamental misunderstanding of the Act. The language and purpose of the Act speak not of legal insurance transactions, but instead seek to allow states to regulate and enforce the insurance business without fear of

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[3] (...continued)
We disagree. As *Fabe* makes clear, the *Royal Drug* test is only a starting point in the analysis for non-antitrust cases. 508 U.S. 503-5. However, because laws "enacted . . . for the purpose of regulating the business of insurance" necessarily encompass more than just the insurance business, the analysis here is broader.

unintended federal interference. We agree with the Court of Appeals for the Ninth Circuit that if we were to construe the "business of insurance" phrase by reference to federal legality, the statute would be read out of existence. *Merchants*, 50 F.3d at 1490. As noted by the Seventh Circuit Court of Appeals, "it is not helpful to point to a practice forbidden by federal law . . . and observe that this practice is not itself insurance." *NAACP v. American Family Mut. Ins. Co.*, 978 F. 2d 287, 294 (7th Cir. 1992). It is not surprising, therefore, that the majority of courts have rejected this same argument advanced here by the plaintiff, and so do we. *See Dornberger*, 961 F. Supp. at 517 (surveying cases).

C. Preclusion of RICO Claims Under the McCarran-Ferguson Act

Having found that the activity challenged in the complaint constitutes the business of insurance, and is therefore within the ambit of the Act, we consider whether plaintiff's RICO cause of action is precluded under § 1012(b). No party to the appeal argues that RICO specifically relates to insurance. Indeed, virtually every court considering this issue has held that RICO is not a federal statute exempt from the McCarran-Ferguson Act. *See, e.g., Kenty*, 92 F.3d at 391; *Merchants*, 50 F.3d at 1489; *Dornberger*, 961 F. Supp. at 516. Nor is it disputed that the applicable Pennsylvania insurance statute is a state law enacted for the purpose of regulating the insurance business. Thus, all that is left for us to consider under the Act is whether an application of RICO to the instant case would "invalidate, impair, or supersede" state law.

1. Pennsylvania Insurance Laws and RICO

In order to determine whether a cause of action under RICO would "invalidate, impair, or supersede" Pennsylvania

insurance law, we must initially juxtapose RICO with a specific state law enacted for the purpose of regulating the insurance business. The district court, along with both sides on appeal, point to Pennsylvania's Unfair Insurance Practices Act, 40 Pa. Cons. Stat. Ann. §§ 1171.1 to 1171.15 (West 1992) ("UIPA"), as the relevant state law governing MetLife's challenged activity. The Act prohibits persons from engaging in unfair or deceptive practices in the business of insurance. *Id.* § 1171.4. An exhaustive list of activity is set forth in section 1171.5 as deceptive or unfair practices forbidden under section 1171.4. The UIPA further empowers the Pennsylvania insurance commissioner to investigate illegal insurance practices and to take certain remedial actions including the imposition of monetary penalties, "cease and desist" orders, the suspension or revocation of an insurance license, or additional injunctive relief. *Id.* §§ 1171.7 to 1171.11.

By judicial precedent, the Pennsylvania Insurance Commissioner alone may seek to enforce the UIPA. *See Wright v. North Am. Life Assurance Co.*, 372 Pa. Super. 272, 279, 539 A.2d 434, 438 (1988) ("[T]he provisions of this statute were not intended to confer a right of private action. Rather, the Unfair Insurance Practices Act vests enforcement powers in the Pennsylvania Insurance Commission"); *Wexco*, 820 F. Supp. at 203-204. Pennsylvania courts, however, have not barred common law actions for fraud and deceit arising out of insurance practices even though the UIPA does not allow private causes of action. *Wright*, 372 Pa. Super. at 279, 539 A.2d at 438. These private lawsuits, in addition to other private actions authorized by Pennsylvania law,[4] provided the only

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[4] In addition to common law fraud and deceit, Pennsylvania courts have sanctioned the use of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. Ann.

(continued...)

judicial remedies available to plaintiffs victimized by illegal insurance practices.

RICO, on the other hand, grants a private cause of action to any person injured as a result of a pattern of racketeering activity. 18 U.S.C. § 1964(c). The statute also authorizes the award of treble damages, attorney's fees, and costs. *Id.* Pursuant to 18 U.S.C. § 1961(2), a pattern of racketeering activity is defined as at least two acts of illegal activity identified in section 1961(1) and includes both mail fraud and wire fraud. Beyond the general classes of crimes enumerated in section 1961(1), RICO does not specifically address insurance practices.

2. "Invalidate, Impair, or Supersede"

Given this comparison of RICO with the UIPA, the legal question before us is whether allowing plaintiff's suit under RICO would "invalidate, impair, or supersede" Pennsylvania law as that phrase is understood under the Act. The phrase "invalidate, impair, or supersede" is not defined anywhere in the Act and we are faced with the considerable task of grappling with its construction in the present context.

Courts of Appeals jurisprudence is in disarray as to the extent and meaning of invalidate, impair or supersede under the Act. One line of cases, spearheaded by the first, seventh, and ninth circuit Courts of Appeals, looks to a direct conflict in the substantive provisions of the federal and state statutes at issue. *See Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1491-92 (9th Cir. 1995); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir.

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[4] (...continued)
§§ 201-1 to 201-9.2 (West 1993), to allow aggrieved insureds recovery against insurance fraud. *See Pekular v. Eich*, 355 Pa. Super. 276, 285-90, 513 A.2d 427, 432-41 (1986).

1992); *Villafane-Neriz v. FDIC*, 75 F.3d 727, 736 (1st Cir. 1996). These courts typically reason that the Act is a form of inverse preemption where federal laws must yield to state laws when the state enacts a statute for the purpose of regulating the insurance business and the federal statute does not specifically apply to insurance. Logic then drawn from ordinary rules of federal preemption under the supremacy clause is reversed so that a state law will not preempt a federal law unless the laws of both sovereigns directly conflict in terms of governing the behavior of insurance carriers. *See American Family*, 978 F.2d at 296 (citing *Silkwood v Kerr-McGee Corp.*, 464 U.S. 238 (1984)). The Act's preemption is appropriate, these courts will conclude, where it is simply not possible for the insurance carrier to comply with both state and federal law. However, because "duplication is not conflict," differences in state remedies and federal remedies could not be the bases of preemption when both statutes proscribe the same insurance practices. *Id.*

In further support for the foregoing analysis, these courts reason that the Act was not intended to cede the entire field of insurance regulation to the states. Where a state law or regulation is silent as to remedy, or does not provide a private cause of action, federal regulation will not be preempted. *Merchants.* 50 F.3d 1492. A contrary interpretation of the statute, these courts will conclude, would essentially rewrite the Act to read: No federal statute shall be construed to apply to the business of insurance, unless such federal statute specifically relates to the business of insurance. The Congress did not so provide and therefore state silence surrounding the assurance of a private remedy does not provide the basis for federal preemption. *Id.*

The fourth, eighth, and to a certain extent the sixth, circuit Courts of Appeals disagree. When state insurance laws provide for enforcement through an administrative process to

the exclusion of private damage actions, treble damages, attorney's fees, and costs, these courts reason that RICO's expanded remedial framework cannot coexist with state law based on a plain meaning of the words "invalidate," "impair," and "supersede."[5] *See Doe v. Norwest Bank Minn.*, 107 F.3d 1297, 1307 (8th Cir. 1997); *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153, 1165 (E.D.Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1997) (unpublished per curiam). They say the Act was designed to allow state legislatures to adopt their own regulatory framework governing how insurance grievances are redressed. If a state chose a private forum for redress through administrative enforcement, then the Act would protect such a decision and federal law would not be allowed to upset this balance. Thus, they conclude that the drastic nature of federal remedies is directly relevant to assessing the application of the "invalidate, impair, or supersede" phrase in the Act. *See Doe*, 107 F.3d at 1307; *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996).

To be sure, a direct conflict in the substantive provisions of RICO with those provided for in the UIPA would fall within the ambit of laws that invalidate, impair, or supersede state insurance law. If, for example, Pennsylvania explicitly authorizes certain insurance practices that RICO would clearly prohibit, the McCarran-Ferguson Act would eviscerate the federal cause of action. *Cf. American Family*, 978 F.2d at 297 ("If Wisconsin wants to authorize redlining, it need only say so; if it does, any challenge to that practice under the auspices of the Fair Housing Act becomes untenable."). This would be the

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[5] "Invalidate" is defined as "to weaken or make valueless;" "impair" means to "make worse . . . diminish in quantity, value, excellence or strength;""supersede" means to "make obsolete, inferior, or outmoded." Webster's Third New International Dictionary 1199, 1131, 2295 (1986). *See Ambrose*, 891 F. Supp. at 1165.

case no matter how the phrase "invalidate, impair, or supersede" is to be construed, as we cannot imagine any more impairment then an absolute contradiction in legal fiat concerning insurance practices. But we cannot find any such conflict in the UIPA when compared to RICO, at least in the present context. Consequently, the more critical issue is whether we may look to divergent state and federal implementation of similar legal norms.

Part of this puzzle has been answered by the Supreme Court in *National Securities*. There, the Securities and Exchange Commission sought to unwind a merger between two insurance companies based on violations of Rule 10b-5. The merger had already been approved by the Arizona State Director of Insurance in his capacity as licensor of insurers within the state. This approval was predicated upon a finding that the merger would not "substantially reduce the security of and service to be rendered to policyholders." 393 U.S. at 462 (quoting Ariz. Rev. Stat. Ann. § 20-731(B)(3) (1969)).

Upon the foregoing factual scenario, the Supreme Court phrased the issue as whether the "McCarran-Ferguson Act bars a federal remedy which affects a matter subject to state insurance regulation." *Id.* The Court reasoned that any "impairment" in the case would be indirect—the federal government sought to protect security holders while the Arizona sought to safeguard insurance policy holders. *Id.* at 463.

Moreover, the Court noted that there was no true "conflict" in remedies at all because "Arizona has not commanded something which the Federal Government seeks to prohibit." *Id.* at 463. The Court also found that the paramount federal interest in prohibiting securities fraud was perfectly compatible with the state interest in protecting policyholders. Thus, because of the nature of the indirect impairment, and

because "the remedy the Commission seeks does not affect a matter predominantly of concern to policyholders alone," the Court held that it saw no reason to emasculate securities laws through an application of the McCarran-Ferguson Act. In the end, the Supreme Court "simply [could] not see the conflict" and allowed the federal government to unwind the merger notwithstanding Arizona's explicit approval. *Id.*

We too cannot see the conflict in this case and find no invalidation, impairment, or supersedence, however defined, of Pennsylvania insurance law. The federal policies embodied in RICO, namely, the grant of a liberal federal remedy to those who have been victimized by organized crime, *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 487 (1985), are in no way inconsistent with the stated purpose of the UIPA, which is to "regulate trade practices in the business of insurance . . . by defining . . . such practices . . . which constitute unfair methods of competition or unfair or deceptive acts . . ." 40 Pa. Cons. Stat. Ann. § 1171.2; *see also D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 494 Pa. 501, 508, 431 A.2d 966, 970 (1981) (stating that the UIPA serves to deter bad faith conduct in the insurance business). Borrowing from the Supreme Court's analysis in *National Securities*, the RICO remedy does not exclusively affect matters predominantly of concern to those protected only by the UIPA. 393 U.S. at 463. RICO, whether in effect or purpose, is not an attempt to regulate the "sphere reserved primarily to the States by the McCarran-Ferguson Act." *Id.*

Of course, this court would be remiss not to recognize MetLife's argument that an application of RICO may affect, in a more abstract sense, Pennsylvania's overall implementation of insurance norms and is decision to enforce certain insurance violations in an administrative context. As acknowledged by the Court of Appeals for the Seventh Circuit:

> Undoubtedly there is a sense in which any overlap between state and federal law upsets a balance struck by one of the two legislatures . . . Laws enforced only be administrative agencies with limited budgets are less potent than laws enforced by both agencies and private litigants. One could say that a federal rule increasing the probability that a state norm will be vindicated (or augmenting the damages assessed in the event of a violation) conflicts with a decision by the state that remedies should be limited or rare.

American Family, 978 F.2d at 295 (citations omitted). While such an argument may be compelling, there is no place for it in the present context. We find no indication, through legislative intent or judicial interpretation, that Pennsylvania's non-recognition of a private remedy under the UIPA represents a reasoned state policy of exclusive administrative enforcement or that the vindication of UIPA norms should be limited or rare. Private actions for fraud and deceit in the insurance business coexist with the UIPA even though the same conduct may be covered by both the common law and the UIPA. *See, e.g.*, 40 Pa. Cons. Stat. Ann §§ 1171.5(1) to 1171.5(3) (generally prohibiting "false," "misleading" or misrepresentative statements and omissions). In addition, Pennsylvania courts have held that the state's general consumer protection statute, 73 Pa. Cons. Stat. Ann. §§ 201-1 to 201-9.2, provides a private remedy and treble damages for victims of insurance fraud. *See Peckular*, 355 Pa. Super. at 285-90, 512 A.2d at 430-41. This certainly undercuts any purported balance struck by the Pennsylvania legislature favoring administrative enforcement to the exclusion of private damages actions and we see no reason why a federal private right of action cannot coexist with the UIPA in these circumstances.

We therefore conclude that a RICO cause of action and remedy would not "invalidate, impair or supersede" Pennsylvania's scheme of insurance regulation in this context. Because we need not reach the issue here, we will leave for another day the question of whether different federal and state remedies could ever be the basis for preclusion under the Act. Accordingly, the district court's dismissal of the plaintiff's RICO claims for failure to state a claim will be reversed to the extent it relied on the McCarran-Ferguson Act as a basis for preclusion. We will also reverse the district court's denial of the motion to amend the complaint since the amendment would no longer be futile under our application of the McCarran-Ferguson Act. In so doing, however, we express no opinion as to whether the plaintiff has stated proper claims under RICO law itself.

III. The Defamation Claim

The Plaintiff's complaint also included a defamation claim against MetLife alone based on Pennsylvania law. In due course, MetLife filed a motion for summary judgment on such a claim which was granted. We will review plaintiff's appeal of this order under a summary judgment standard. The district court's grant of summary judgement will be affirmed if, after a plenary review of the record, there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). This court will not weigh the evidence in the record itself, but instead determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 247 (1986); *Petruzzi's IGA v. Darling-Delaware*, 998 F.2d 1224, 1230 (3d Cir. 1993). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248.

Plaintiff's defamation claim arises out of the following circumstances as set forth in the affidavit of Fred Newstrom ("Newstrom"), a sales agent for MetLife who worked with plaintiff at one time. The affidavit is based on personal knowledge, as required by Fed. R. Civ. P. 56(e).

About August 23, 1993, MetLife convened a meeting of its sales agents in the Pittsburgh region. Several hundred agents were in attendance, including Newstrom. There were various speakers, including Gary Antonino ("Antonino"), Pittsburgh Regional Manager, and Robert Crimmons, MetLife Executive Vice President for Personal Insurance. Other senior managers of MetLife were also on the dais.

During the course of an address given to the agents by Antonino, a brief clip from the movie Ghostbusters was shown. In the clip, an animated ghost figure known to those familiar with the movie as "Slimer" charges down a long hallway and attacks one of the other characters. "Slimer" is a short, fat,

malformed green ghost who attacks his victims by covering them with a slime or gooey material.

Immediately following the showing of the movie clip, Antonino made statements to the audience about the way the media were portraying MetLife.

The affidavit then goes on:

> At or about the time of this meeting at the Royce Hotel, MetLife was the subject of an ongoing investigative report on the Channel 11 news, in which statements were made that MetLife was under investigation by the Pennsylvania Insurance Department for illegal deceptive sales and trade practices.
>
> Also during this time period, Antonino was letting it be known through the region that he "had it in" for Sabo, and that Sabo was at fault for all of MetLife's difficulties.
>
> Based upon the showing of the movie clip and the statements made by Antonino immediately thereafter, Hermann understood Antonino to be saying that it was Sabo [plaintiff] who was spreading false information to the media, and that Sabo was attempting to wrongfully bring about the demise of MetLife.

App. at 487 (alteration in original). After the meeting, other MetLife agents who attended the meeting informed Newstrom that they also believed that Antonino's message was that Sabo was responsible for the information about MetLife in the media. *Id.*

In addition to the affidavit of Newstrom, an affidavit by agent Ronald Herrmann was filed. It also was based on personal knowledge. In it he recited that he also attended the

meeting and that he also understood Sabo to be Slimer and the evil presence at MetLife. However, Herrmann did not state that Antonio "had it in" for the plaintiff.

A copy of the Report and Recommendation of the Magistrate Judge who heard the matter recommended to the district court that summary judgment be granted to MetLife on the defamation claim based solely on the ground that there was no support in the record for a finding that plaintiff was the intended target of any comments made during the "Ghostbuster" presentation. Thereafter, the district court granted MetLife's motion for summary judgment on the defamation claim solely on the ground recommended by the Magistrate Judge.

We note at the outset of this appeal that in an action for defamation under Pennsylvania law, the plaintiff has the burden of proving: (1) the defamatory character of the communications; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion. 42 Pa. Cons. Stat. Ann. § 8343(a).

We analyze the record keeping in mind that we are reviewing summary judgment and that the sole basis for granting the motion in the district court was the absence of evidence to meet this fifth requirement of the Pennsylvania statute, *viz.*, understanding by the recipients of it that it was intended to be applied to plaintiff.

Plaintiff concedes that the alleged defamatory matter, standing on its own, is insufficient to support a jury finding that it refers to him. However, he argues that the defamation analysis must nevertheless proceed as to the fifth element if the

defamatory statements may point to the defamed through "description or circumstances tending to identify him." *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 408 Pa. 314, 319, 182 A.2d 751, 753 (1962). We turn to that contention.

Taking the recited contents of the affidavits as true, we think it reasonable to infer at this point that the affiants were aware at the time of the meeting of rumors with respect to MetLife's controversy with the plaintiff. When this circumstance is combined with the contents of the movie clip and Antonino's remarks thereafter, a genuine issue of material fact was created with respect to the fifth requirement of the Pennsylvania statute. Consequently, the resolution of that factual issue was for the finder of fact. Thus, summary judgment should not have been granted based on a failure to meet this requirement.

But our conclusion that the district court erred in its ruling on the foregoing issued does not end the matter. We cannot tell from the record whether MetLife asserted grounds other than a failure to meet the fifth element of the Pennsylvania statute in support of its summary judgment motion. Thus, we conclude that our reversal of the order granting summary judgment must be without prejudice to the district court's right to consider other asserted grounds for summary judgment, if any, that are still before it.

IV. Conclusion

The order of the district court dismissing plaintiff's RICO claim will be reversed, and the order denying plaintiff's motion to amend the complaint will be vacated. The order of the district court granting MetLife's motion for summary judgment on plaintiff's defamation claim will be reversed to the extent it was based on the ground relied on by the district court. It is further ordered that this ruling is without prejudice to a

consideration by the district court of other asserted grounds, if any, for summary judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D – DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 31, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-3663

RICHARD SABO
Appellant

v.

METROPOLITAN LIFE INSURANCE COMPANY; GARY ANTONINO; JOEL SHERMAN, RONALD SCHRAM; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, RENDELL, and SEITZ, Circuit Judges

The petition for rehearing filed by appellant [sic] in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: March 31, 1998

*Hon. Collins J. Seitz, Senior U.S. Circuit Judge for the Third Circuit, was a member of the original panel. His vote is limited to panel rehearing.

APPENDIX E – RELEVANT STATUTES

THE McCARRAN-FERGUSON ACT,
15 U.S.C.§ 1011 TO § 1015

§ 1011. Declaration of policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

§ 1014. Effect on other laws

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

§ 1015. "State" defined

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS, 18 U.S.C. § 1861 to § 1864

§ 1961. Definitions

As used in this chapter-

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-65 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section

1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phono records, computer programs, or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments

and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprison-

ment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency

so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of

which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provision of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law -

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any -

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes–

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section–

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that–

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to

which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to–

> (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to–

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter.

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may–

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of

petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held

within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that–

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without

cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant–

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been place beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not

limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate Untied States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

PENNSYLVANIA STATE RICO STATUTE, 18 Pa. S. § 911

§ 911. Corrupt Organizations

(a) Findings of fact. - The General Assembly finds that:

(1) organized crime is a highly sophisticated, diversified, and widespread phenomenon which annually drains billions of dollars from the national economy by various patterns of unlawful conduct including the illegal use of force, fraud, and corruption;

(2) organized crime exists on a large scale within the Commonwealth of Pennsylvania, engaging in the same patterns of unlawful conduct which characterizes its activities nationally;

(3) the vast amounts of money and power accumulated by organized crime are increasingly used to infiltrate and corrupt legitimate businesses operating within the Commonwealth, together with all of the techniques of violence, intimidation, and other forms of unlawful conduct through which such money and power are derived;

(4) in furtherance of such infiltration and corruption, organized crime utilizes and applies to its unlawful purposes laws of the Commonwealth of Pennsylvania conferring and relating to the privilege of engaging in various types of business and designed to insure that such businesses are conducted in furtherance of the public interest and the general economic welfare of the Commonwealth;

(5) such infiltration and corruption provide an outlet for illegally obtained capital, harm innocent investors, entrepreneurs, merchants and consumers, interfere with free competition, and thereby constitute a substantial danger to the economic and general welfare of the Commonwealth of Pennsylvania; and

(6) in order to successfully resist and eliminate this situation, it is necessary to provide new remedies and procedures.

(b) Prohibited activities. -

(1) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity in which such person participated as a principal, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise: Provided, however, That a purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issue held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase, do not amount in the aggregate to 1% of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer: Provided, further, That if, in any proceeding involving an alleged investment in violation of this subsection, it is established that over half of the defendant's aggregate income for a period of two or more years immediately preceding such investment was derived from a pattern of racketeering activity, a rebuttable presumption shall arise that such investment included income derived from such pattern of racketeering activity.

(2) It shall be unlawful for any person through a pattern of racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

(3) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

(4) It shall be unlawful for any person to conspire to violate any of the provisions of paragraphs (1), (2) or (3) of this subsection.

(c) Grading. - Whoever violates any provision of subsection (b) of this section is guilty of a felony of the first degree. A violation of this subsection shall be deemed to continue so long as the person who committed the violation continues to receive any benefit from the violation.

(d) Civil remedies. -

(1) The several courts of common pleas, and the Commonwealth Court, shall have jurisdiction to prevent and restrain violations of subsection (b) of this section by issuing appropriate orders, including but not limited to:

(i) ordering any person to divest himself of any interest direct or indirect, in the enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in; and

(ii) making due provision for the rights of innocent persons, ordering the dissolution of the enterprise, ordering the denial, suspension or revocation of charters of domestic corporations, certificates of authority authorizing foreign corporations to do business within the Commonwealth of Pennsylvania; or prohibiting the enterprise from engaging in any business.

(2) In any proceeding under this subsection, the court shall proceed as soon as practicable to the hearing and

determination thereof. Pending final determination, the court may enter preliminary or special injunctions, or take such other actions, including the acceptance of satisfactory performance bonds, as it may deem proper.

(3) A final judgment or decree rendered in favor of the Commonwealth of Pennsylvania in any criminal proceeding under this section shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

(4) Proceedings under this subsection, at pretrial, trial and appellate levels, shall be governed by the Pennsylvania Rules of Civil Procedure and all other rules and procedures relating to civil actions, except to the extent inconsistent with the provisions of this section.

(e) Enforcement.-

(1) The Attorney General shall have the power and duty to enforce the provisions of this section, including the authority to issue civil investigative demands pursuant to subsection (f), institute proceedings under subsection (d), and to take such actions as may be necessary to ascertain and investigate alleged violations of this section.

(2) The Attorney General and the district attorneys of the several counties shall have concurrent authority to institute criminal proceedings under the provisions of this section.

(3) Nothing contained in this subsection shall be construed to limit the regulatory or investigative authority of any department or agency of the Commonwealth whose function might relate to persons, enterprises, or matters falling within the scope of this section.

(f) Civil investigative demand.-

(1) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary material relevant to a racketeering investigation, he may issue in writing, and cause to be served upon such person or enterprise, a civil investigative demand requiring the production of such material for examination.

(2) Each such demand shall:

(i) state the nature of the conduct constituting the alleged racketeering violation which is under investigation, the provision of law applicable thereto and the connection between the documentary material demanded and the conduct under investigation;

(ii) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(iii) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction;

(iv) identify a racketeering investigator to whom such material shall be made available; and

(v) contain the following statement printed conspicuously at the top of the demand: "You have the right to seek the assistance of any attorney and he may represent you in all phases of the racketeering investigation of which this civil investigative demand is a part."

(3) No such demand shall:

(i) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by any court in connection with a grand jury investigation of such alleged racketeering violation; or

(ii) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by any court in connection with a grand jury investigation of such alleged racketeering violation.

(4) Service of any such demand or any petition filed under this subsection shall be made in the manner prescribed by the Pennsylvania Rules of Civil Procedure for service of writs and complaints.

(5) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(6)(i) Any party upon whom any demand issued under this subsection has been duly served shall make such material available for inspection and copying or reproduction to the racketeering investigator designated therein at the principal place of business of such party, or at such other place as such investigator and such party thereafter may agree or as the court may direct pursuant to this subsection, on the return date specified in such demand. Such party may upon agreement of the investigator substitute copies of all or any part of such material for the originals thereof.

(ii) The racketeering investigator to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for its return pursuant to this subsection. The

investigator may cause the preparation of such copies of such documentary material as may be required for official use. While in the possession of the investigator, no material so produced shall be available for examination, without the consent of the party who produced such material, by any individual other than the Attorney General or any racketeering investigator. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the investigator shall be available for examination by the party who produced such material or any duly authorized representatives of such party.

(iii) Upon completion of:

(A) the racketeering investigation for which any documentary material was produced under this subsection; and

(B) any case or proceeding arising from such investigation;

the investigator shall return to the party who produced such material all such material other than copies thereof made pursuant to this subsection which have not passed into the control of any court or grand jury through introduction into the record of such case or proceeding.

(iv) When any documentary material has been produced by any party under this subsection for use in any racketeering investigation, and no case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such party shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material, other than copies thereof made pursuant to this subsection so produced by such party.

(7) Whenever any person or enterprise fails to comply with any civil investigative demand duly served upon him under this subsection or whenever satisfactory copying or reproduction of any such material cannot be done and such party refuses to surrender such material, the Attorney General may file, in the court of common pleas for any county in which such party resides or transacts business, and serve upon such party a petition for an order of such court for the enforcement of this subsection, except that if such person transacts business in more than one county such petition shall be filed in the county in which the party maintains his or its principal place of business.

(8) Within 20 days after the service of any such demand upon any person or enterprise, or at any time before the return date specified in the demand, whichever period is shorter, such party may file, in the court of common pleas of the county within which such party resides or transacts business, and serve upon the Attorney General a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this subsection or upon any constitutional or other legal right or privilege of such party.

(9) At any time during which the Attorney General is in custody or control of any documentary material delivered by any party in compliance with any such demand, such party may file, in the court of common pleas of the county within which such documentary material was delivered, and serve upon the Attorney General a petition for an order of such court

requiring the performance of any duty imposed by this subsection.

(10) Whenever any petition is filed in any court of common pleas under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and, after a hearing at which all parties are represented, to enter such order or orders as may be required to carry into effect the provisions of this subsection.

(g) Immunity.- Whenever any individual refuses, on the basis of his privilege against self-incrimination, to comply with a civil investigative demand issued pursuant to subsection (f) or to testify or produce other information in any proceeding under subsection (d), the Attorney General may invoke the provisions of 42 Pa.C.S. § 5947 (relating to immunity of witnesses).

(h) Definitions.- As used in this section:

(1) "Racketeering activity" means:

(i) any act which is indictable under any of the following provisions of this title:

Chapter 25 (relating to criminal homicide)

Section 2706 (relating to terroristic threats)

Chapter 29 (relating to kidnapping)

Chapter 33 (relating to arson, etc)

Chapter 37 (relating to robbery)

Chapter 39 (relating to theft and related offenses)

Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)

Section 4109 (relating to rigging publicly exhibited contest)

Section 4117 (relating to insurance fraud)

Chapter 47 (relating to bribery and corrupt influence)

Chapter 49 (relating to falsification and intimidation)

Section 5111 (relating to dealing in proceeds of unlawful activities)

Section 5512 through 5514 (relating to gambling)

Chapter 59 (relating to public indecency)

(ii) any offense indictable under section 13 of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act (relating to the sale and dispensing of narcotic drugs);

(iii) any conspiracy to commit any of the offenses set forth in subparagraphs (i) and (ii) of this paragraph; or

(iv) the collection of any money or other property in full or partial satisfaction of a debt which arose as the result of the lending of money or other property at a rate of interest exceeding 25% per annum or the equivalent rate for a longer or shorter period, where not otherwise authorized by law.

Any act which otherwise would be considered racketeering activity by reason of the application of this paragraph, shall not be excluded from its application solely because the operative acts took place outside the jurisdiction of this Commonwealth, if such acts would have been in violation of the law of the jurisdiction in which they occurred.

(2) **"Person"** means any individual or entity capable of holding a legal or beneficial interest in property.

(3) **"Enterprise"** means any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce and includes legitimate as well as illegitimate entities and governmental entities.

(4) **"Pattern of racketeering activity"** refers to a course of conduct requiring two or more acts of racketeering activity one of which occurred after the effective date of this section.

(5) **"Racketeering investigator"** means an attorney, investigator or investigative body so designated in writing by the Attorney General and charged with the duty of enforcing or carrying into effect the provisions of this section.

(6) **"Racketeering investigation"** means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this section or of any order, judgment, or decree of any court duly entered in any case or proceeding arising under this section.

(7) **"Documentary material"** means any book, paper, record, recording, tape, report, memorandum, written communication, or other document relating to the business affairs of any person or enterprise.

(8) **"Organized crime"** means any person or combination of persons engaging in or having the purpose of engaging in conduct which violates any provision of subsection (b) and also includes **"organized crime"** as defined in section 5702 (relating to definitions).

PENNSYLVANIA UNFAIR INSURANCE PRACTICES ACT, 40 Pa. S. § 1171 to § 1171.15

§ 1171.1. Short title

This act shall be known and may be cited as the "Unfair Insurance Practices Act."

§ 1171.2. Declaration of purpose

The purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining or providing for the determination of all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting trade practices so defined and determined.

§ 1171.3. Definitions

As used in this act:

"Abuse" has the meaning given in 23 Pa.C.S. § 6102(a) (relating to definitions), notwithstanding the limited applicability provision in paragraph (5) of the definition of "abuse" in 23 Pa.C.S. § 6102(a)(5).

"Commissioner" means the insurance commissioner of the Commonwealth of Pennsylvania.

"Family or household member" has the meaning given in 23 Pa.C.S. § 6102(a) (relating to definitions).

"Insurance policy" or **"Insurance Contract"** means any contract of insurance, indemnity, health care, suretyship, title insurance, or annuity issued, proposed for issuance or intended for issuance by any person.

"Person" means any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds

insurer, fraternal benefit society, beneficial association and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters and also means health care plans. As defined in 40 Pa.C.S.A. Ch. 61 relating to hospital plan corporations, 40 Pa.C.S.A. Ch. 63 relating to professional health services plan corporations, 40 Pa.C.S.A. Ch. 65 relating to fraternal and beneficial societies 40 Pa.C.S.A. Ch. 67 relating to beneficial societies and the act of December 29, 1972 (P.L. 1701, No. 364), known as the "Voluntary Nonprofit Health Service Act of 1972." For purposes of this act, health care plans, fraternal benefit societies and beneficial societies shall be deemed to be engaged in the business of insurance.

"Renewal" or **"to renew"** means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer, such renewal policy to provide types and limits of coverage at least equal to those contained in the policy being superseded, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term with types and limits of coverage at least equal to those contained in the policy being extended: Provided, however, That any policy with a policy period or term of less than twelve months or any period with no fixed expiration date shall for the purpose of this act be considered as if written for successive policy periods or terms of twelve months.

"Victim" means an individual who is or has been subjected to abuse.

"Victim of abuse" means an individual who is a victim or an individual who seeks or has sought medical or psychological treatment for abuse, protection from abuse or shelter from abuse.

§1171.4. Unfair methods of competition and unfair or deceptive acts or practices prohibited

No person shall engage in this state in any trade practice which is defined or determined to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance pursuant to this act.

§ 1174.5. Unfair methods of competition and unfair or deceptive acts or practices defined

(a) **"Unfair methods of competition"** and **"unfair or deceptive acts or practices"** in the business of insurance means:

(1) Making, publishing, issuing or circulating any estimate, illustration, circular, statement, sales presentation, omission comparison which:

(i) Misrepresents the benefits, advantages, conditions or terms of any insurance policy;

(ii) Misrepresents the premium overcharge commonly called dividends or share of the surplus to be received on any insurance policy;

(iii) Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy;

(iv) Is misleading or is a misrepresentation as to the financial condition of any person, or as to the legal reserve system upon which any insurer operates;

(v) Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof;

(vi) Is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion or surrender of any insurance policy;

(vii) Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy; or

(viii) Misrepresents any insurance policy as being shares of stock.

(2) Making, issuing, publishing or circulating in any manner an advertisement, announcement or statement containing any representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business which is untrue, deceptive or misleading.

(3) Making, issuing, publishing or circulating any oral or written statement which is false or maliciously critical of or derogatory to the financial condition of any person, and which is calculated to injure such person.

(4) Entering into any agreement to commit, or by any concerted action committing, any act or boycott, coercion or intimation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(5) Knowingly filing with any supervisory or other public official, or knowingly making, issuing, publishing or circulating any false material statement of fact as to the financial condition of a person, or knowingly making any false entry of a material fact in any book, report or statement of any person, or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report or statement of such person.

(6) Issuing or delivering or permitting agents, officers or employees to issue or deliver agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or

advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(7) Unfairly discriminating by means of:

(i) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract; or

(ii) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy, fees or rates charged for any policy or contract of insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(iii) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard with regard to underwriting standards and practices or eligibility requirements by reason of race, religion, nationality, or ethnic group, age, sex, family size, occupation, place of residence or marital status. The terms "underwriting standards and practices" or "eligibility rules" do not include the promulgation of rates if made or promulgated in accordance with the appropriate rate regulatory act of this commonwealth and regulations promulgated by the commissioner pursuant to such act.

(8) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow or give as inducement to such insurance, any rebate of premiums payable on the contract, or any special favor or

advantage in the dividends or other benefits thereon, or any valuable consideration, inducement or anything of value whatsoever which is not specified in the contract.

(9) Cancelling any policy of insurance covering owner-occupied private residential properties or personal property of individuals that has been in force for sixty days or more or refusing to renew any such policy unless the policy was obtained through material misrepresentation, fraudulent statements, omissions or concealment of fact material to the acceptance of the risk or to the hazard assumed by the company; or there has been a substantial change or increase in hazard in the risk assumed by the company subsequent to the date the policy was issued; or there is a substantial increase in hazards insured against by reason of wilful or negligent acts or omissions by the insured; or the insured has failed to pay any premium when due whether such premium is payable directly to the company or its agent or indirectly under any premium finance plan or extension of credit; or for any other reasons approved by the commissioner pursuant to rules and regulations promulgated by the commissioner. No cancellation or refusal to renew by any person shall be effective unless a written notice of the cancellation or refusal to renew is received by the insured either at the address shown in the policy or at a forwarding address. Such notice shall:

(i) Be approved as to form by the insurance commissioner prior to use.

(ii) State the date, not less than thirty days after the date of delivery or mailing on which such cancellation or refusal to renew shall become effective.

(iii) State the specific reason or reasons of the insurer for cancellation or refusal to renew.

(iv) Advise the insured of his right to request, in writing, within ten days of the receipt of the notice

of cancellation or intention not to renew that the insurance commissioner review the action of the insurer.

(v) Advise the insured of his possible eligibility for insurance under the act of July 31, 1968 (P.L. 738, No. 233), known as "The Pennsylvania Fair Plan Act," or the Pennsylvania Assigned Risk Plan.

(vi) Advise the insured in a form commonly understandable of the provisions of subparagraphs (II), (III), and (IV) of this paragraph as they limit permissible time and reasons for cancellation.

(vii) Advise the insured of the procedures to be followed in prosecuting an appeal.

(10) Any of the following acts if committed or performed with such frequency as to indicate a business practice shall constitute unfair claim settlement or compromise practices.

(i) Misrepresenting pertinent facts or policy or contract provisions relating to coverages at issue.

(ii) Failing to acknowledge and act promptly upon written or oral communications with respect to claims arising under insurance policies.

(iii) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

(iv) Refusing to pay claims without conducting a reasonable investigation based upon all available information.

(v) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed and communicated to the company or its representative.

(vi) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which the company's liability under the policy has become reasonably clear.

(vii) Compelling persons to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts due and ultimately recovered in actions brought by such persons.

(viii) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(ix) Attempting to settle or compromise claims on the basis of an application which was altered without notice to or knowledge or consent of the insured of such alteration at the time such alteration was made.

(x) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made.

(xi) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants to induce or compel them to accept settlements or compromises less than the amount awarded in arbitration.

(xii) Delaying the investigation or payment of claims by requiring the insured, claimant or the physician or either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(xiii) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage or under other policies of insurance.

(xiv) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(xv) Refusing payment of a claim solely on the basis of an insured's request to do so unless:

(a) The insured claims sovereign, eleemosynary, diplomatic, military service, or other immunity from suit or liability with respect to such claim;

(b) The insured is granted a right under the policy of insurance to consent to settlement of claims; or

(c) The refusal of payment is based upon the insurer's independent evaluation of the insured's liability based upon all available information.

(11) Failure of any person to maintain a complete record of all the complaints which it has received during the preceding four years. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints and the time it took to process each complaint. For purposes of this paragraph, "complaint" means any written communication primarily expressing a grievance.

(12) Making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money or other benefit from any insurers, agent, broker or individual.

(13) Making, issuing, publishing or circulating in any manner an advertisement, announcement or statement offering permanent life insurance to persons fifty years of age or older without accompanying disclosures of any applicable reduction in the face amount payable and the period thereof.

(14)(i) Taking any of the following actions because the insured or applicant for an insurance policy or insurance contract is the victim of abuse:

(A) Denying, refusing to issue, refusing to renew, refusing to reissue or cancelling or terminating an insurance policy or insurance contract or restricting coverage under an insurance policy or insurance contract.

(B) Adding a surcharge, applying a rating factor or using any other underwriting standard or practice which adversely takes into account a history or status of abuse.

(C) Excluding or limiting benefits or coverage under an insurance policy or insurance contract for losses incurred.

(ii) Nothing in this paragraph shall be construed as:

(A) requiring that a person issue, renew or reissue an insurance policy or insurance contract solely because the insured or applicant is a victim of abuse; or

(B) requiring a person to provide benefits or coverage for losses incurred solely because the insured or applicant is a victim of abuse.

(iii) A person shall not be in violation of this paragraph if any action taken is permissible by law and applies to the same extent to all applicants and insureds without regard to whether an applicant or insured is a victim of abuse.

(b) Nothing in subsection (a)(7) or (8) of this section shall be construed as including within the definition of discrimination or rebates any of the following practices:

(1) In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums out of surplus accumulated from nonparticipating insurance if any such bonuses or abatement of premiums are fair and equitable to policyholders and for the best interests of the company and its policyholders;

(2) In the case of life insurance policies issued on the industrial or debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; or

(3) Readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

(c) Nothing in subsection (a)(9) of this section shall apply:

(1) If the insurer has manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, including the mailing of a renewal premium notice to the insured not less than thirty days in advance of the expiration date of the policy.

(2) If the named insured has demonstrated by some overt action to the insurer or its agent other than mere nonpayment of premium that he wishes the policy to be cancelled or that he does not wish the policy to be renewed.

(3) To any policy of insurance which has been in effect less than sixty days, including any notice of termination

period, unless it is a renewal policy. Any declination of coverage within the sixty-day period provided in this clause shall, for purposes of review by the insurance commissioner, be deemed a refusal to write and shall not be subject to the provisions of subsection (a)(9) of this section.

(4) Any insured may within ten days of the receipt by the insured of notice of cancellation or notice of intention not to renew, request in writing to the insurance commissioner that he review the action of the insurer in cancelling or refusing to renew the policy of such insured.

§ 1171.6. Non-liability for statements or information provided

There shall be no liability on the part of and no cause of action of any nature shall arise against the insurance commissioner, any insurer, the authorized representatives, agents and employees of either, or of any firm, person or corporation furnishing to the insurer for any statement made by them in complying with this act or for providing information pertaining thereto.

§ 1171.7. Power of Commissioner

The Commissioner may examine and investigate the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by this act.

§ 1171.8. Administrative hearing

(a) If, as a result of investigation, the Commissioner has good cause to believe that any person is violating any provision of this act, the Commissioner shall send notice of the violation by certified mail to the person believed to be in violation. The notice shall state the time and place for hearing

which shall not be less than thirty days from the date of such notice.

(b) At the time and place fixed for the hearing in the notice, the person shall have an opportunity to be heard and to show cause why an order shall not be made by the commissioner to cease and desist from acts constituting a violation of this act and why administrative penalties should not be assessed.

(c) Upon good cause shown, the Commissioner shall permit any person to intervene, appear and be heard at the hearing, either in person or by counsel.

(d) The Commissioner may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence and subpoena witnesses, compel their attendance and require the production of books, papers, records or other documents which he deems relevant to the hearing. The Commissioner shall cause a record of all evidence and all proceedings at the hearing to be kept.

(e) Following the hearing, the Commissioner shall issue a written order resolving the factual issues presented at the hearing and stating what remedial action, if any, is required of the person charged. The Commissioner shall send a copy of the order to those persons participating in the hearing.

§ 1171.9. Administrative penalty

Upon a determination by hearing that this act has been violated, the Commissioner may issue an order requiring the person to cease and desist from engaging in such violation or, if such violation is a method of competition, act or practice defined in section 5 of this act, the Commissioner may suspend or revoke the person's license.

§ 1171.10. Injunction

If the alleged violator fails to comply with an order of the Commissioner following hearing to cease and desist from unfair methods of competition or an unfair or deceptive act or practice, the Commissioner may cause an action for injunction to be filed in the Commonwealth Court or the Court of Common Pleas of the county in which the violation occurred.

§ 1171.11. Civil penalties

In addition to any penalties imposed pursuant to this act, the court may, in an action filed by the Commissioner, impose the following civil penalties:

(1) For each method of competition, act or practice defined in section 5 of this act and in violation of this act which the person knew or reasonably should have known was such a violation, a penalty of not more than five thousand dollars ($5,000) for each but not to exceed and aggregate penalty of fifty thousand dollars ($50,000) in any six month period;

(2) For each method of competition, act or practice defined in section 5 of this act and in violation of this act which the person did not know nor reasonably should have known was such a violation, a penalty of not more than one thousand dollars ($1,000) for each violation but not to exceed an aggregate penalty of ten thousand dollars ($10,000) in any six month period; and

(3) For each violation of an order issued by the Commissioner pursuant to section 9 of this act, while such order is in effect, a penalty of not more than ten thousand dollars ($10,000).

§ 1171.12. Repealed

§ 1171.13. Provisions of act additional to existing law

The powers vested in the Commissioner by this act are additional to any other powers to enforce any penalties, fines or

forfeitures authorized by law with respect to the methods, acts and practices declared to be unfair and deceptive.

§ 1171.14. Exclusions

Health care plans administered by Joint Boards of Trustees pursuant to section 302 of The Labor Management Relations Act, 29 U.S.C. § 141, et seq., and employer administered health care plans pursuant to collective bargaining agreements which pay benefits from the assets of the trust or the funds of the employer as opposed to payments through an insurance company shall not be subject to any of the provisions of this act.

§ 1171.15. Repeals

(a) The act of June 5, 1947 (P.L. 445, No. 202), known as "The Insurance Unfair Practices Act," is repealed absolutely.

(b) All other acts and parts of acts are repealed in so far as they are inconsistent herewith.

PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW, 40 Pa. S. § 201-1 to § 201-9.2

§ 201-1. Short title

This act shall be known and may be cited as the "Unfair Trade Practices and Consumer Protection Law."

§ 201-2. Definitions

As used in this act.

(1) "**Documentary material**" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording, wherever situate.

(2) "**Person**" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.

(3) "**Trade**" and "**commerce**" mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.

(4) "**Unfair methods of competition**" and "**unfair or deceptive acts or practices**" mean any one or more of the following:

(i) Passing off goods or services as those of another;

(ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

(iv) Using deceptive representations or designations of geographic origin in connection with goods or services;

(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(viii) Disparaging the goods, services or business of another by false or misleading representation of fact;

(ix) Advertising goods or services with intent not to sell them as advertised;

(x) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(xi) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(xii) Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to

procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase;

(xiii) Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. In addition, promoting or engaging in any plan, commonly known as or similar to the so-called **"Chain-Letter Plan"** or **"Pyramid Club**." The terms **"Chain-Letter Plan"** or **"Pyramid Club"** mean any scheme for the disposal or distribution of property, services or anything of value whereby a participant pays valuable consideration, in whole or in part, for an opportunity to receive compensation for introducing or attempting to introduce one or more additional persons to participate in the scheme or for the opportunity to receive compensation when a person introduced by the participant introduces a new participant. As used in this subclause the term "consideration" means an investment of cash or the purchase of goods, other property, training or services, but does not include payments made for sales demonstration equipment and materials for use in making sales and not for resale furnished at no profit to any person in the program or to the company or corporation, nor does the term apply to a minimal initial payment of twenty-five dollars ($25) or less;

(xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;

(xv) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;

(xvi) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;

(xvii) Making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:

(A) the identity of the seller;

(B) that the purpose of the call is to sell goods or services;

(C) the nature of the goods or services; and

(D) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion;

(xviii) Using a contract, form or any other document related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;

(xix) Soliciting any order for the sale of goods to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

(A) within that time clearly and conspicuously stated in any such solicitation; or

(B) if no time is clearly and conspicuously stated, within thirty days after receipt of a properly completed order from the buyer, provided, however, where, at the time the merchandise is ordered, the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have fifty days, rather than thirty days, to perform the actions required by this subclause;

(xx) Failing to inform the purchaser of a new motor vehicle offered for sale at retail by a motor vehicle dealer of the following:

(A) that any rustproofing of the new motor vehicle offered by the motor vehicle dealer is optional;

(B) that the new motor vehicle has been rustproofed by the manufacturer and the nature and extent, if any, of the manufacturer's warranty which is applicable to that rustproofing;

The requirements of this subclause shall not be applicable and a motor vehicle dealer shall have no duty to inform if the motor vehicle dealer rustproofed a new motor vehicle before offering it for sale to that purchaser, provided that the dealer shall inform the purchaser whenever dealer rustproofing has an effect of any manufacturer's warranty applicable to the vehicle. This subclause shall not apply to any new motor vehicle which has been rustproofed by a motor vehicle dealer prior to the effective date of this subclause.

(xxi) Engaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding.

§ 201-3. Unlawful acts or practices; exclusions

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as defined by subclauses (i) through (xvii) of clause (4) of section 2 of this act and regulations promulgated under section 3.1 of

this act are hereby declared unlawful. The provisions of this act shall not apply to any owner, agent or employe [sic] of any radio or television station, or to any owner, publisher, printer, agent or employe [sic] of a newspaper or other publication, periodical or circular, who, in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement.

§ 201-3.1. Regulations

The Attorney General may adopt, after public hearing, such rules and regulations as may be necessary for the enforcement and administration of this act. Such rules and regulations when promulgated pursuant to the act of July 31, 1968 (P.L. 769, No. 240), known as the "Commonwealth Documents Law," shall have the force and effect of law.

§ 201-4. Restraining prohibited acts

Whenever the Attorney General or a District Attorney has reason to believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

§ 201-4.1. Payment of costs and restitution

Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.

§ 201-5. Assurances of voluntary compliance

In the administration of this act, the Attorney General may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of the act from any person who has engaged or was about to engage in such method, act or practice. Such assurance may include a stipulation for voluntary payment by the alleged violator providing for the restitution by the alleged violator to consumers, of money, property or other things received from them in connection with a violation of this act. Any such assurance shall be in writing and be filed with the court. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the Attorney General for further proceedings in the public interest, pursuant to section 4.

§ 201-6. Deleted by amendment.

§ 201-7. Contracts; effect of rescission

(a) Where goods or services having a sale price of twenty-five dollars ($25) or more are sold or contracted to be sold to a buyer, as a result of, or in connection with, a contact with or call on the buyer or resident at his residence, either in person or by telephone, that consumer may avoid the contract or sale by notifying, in writing, the seller within three full business days following the day on which the contract or sale was made and by returning or holding available for return to the seller, in its original condition, any merchandise received under the contract or sale. Such notice of rescission shall be effective upon depositing the same in the United States mail or upon other service which gives the seller notice of rescission.

(b) At the time of the sale or contract the buyer shall be provided with:

(1) A fully completed receipt or copy of any contract pertaining to such sale, which is in the same language (Spanish, English, etc.) as that principally used in the oral sales

presentation, and also in English, and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of ten points, a statement in substantially the following form:

> "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

(2) A completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten-point bold face type the following information and statements in the same language (Spanish, English, etc.) as that used in the contract:

Notice of Cancellation

(Enter Date of Transaction)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence in substantially as good condition as when received, any goods delivered to you under this contract or sale;

or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to (name of seller), at (address of seller's place of business) not later than midnight of (date).

I hereby cancel this transaction.

_____

(Date)

_____

Buyer's Signature

(c) Before furnishing copies of the "Notice of Cancellation" to the buyer, both copies shall be completed by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(d) Each buyer shall be informed at the time he signs the contract or purchases the goods or services, of his right to cancel.

(e) The cancellation period provided for in this section shall not begin to run until buyer has been informed or his right to cancel and has been provided with copies of the "Notice of Cancellation."

(f) Seller shall not misrepresent in any manner the buyer's right to cancel.

(g) Any valid notice of cancellation by a buyer shall be honored and within ten business days after the receipt of such notice, seller shall (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(h) No note or other evidence of indebtedness shall be negotiated, transferred, sold or assigned by the seller to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

(i) Seller shall, within ten business days of receipt of the buyer's notice of cancellation, notify him whether the seller intends to repossess or to abandon any shipped or delivered goods. If seller elects to repossess, he must do so within twenty days of the date of buyer's notice of cancellation or forfeit all rights to the delivered goods.

(j) Rights afforded under this section may be waived only in circumstances where the goods or services are needed to meet a bona fide immediate personal emergency of the buyer and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three business days.

(k) As used in this section, merchandise shall not be construed to mean real property.

(*l*) The provisions of this section shall not apply to the sale or contract for the sale of goods or services having a sale price of less than twenty-five dollars ($25).

(m) A "Notice of Cancellation" which contains the form and content required by rule or regulation of the Federal Trade Commission shall be deemed to be in compliance with the requirements of this section.

§ 201-8. Civil penalties

(a) Any person who violates the terms of an injunction issued under section 4 of this act or any of the terms of an assurance of voluntary compliance duly filed in court under section 5 of this act shall forfeit and pay to the Commonwealth a civil penalty of not more than five thousand dollars ($5,000) for each violation. For the purposes of this section the court issuing an injunction or in which an assurance of voluntary compliance is filed shall retain jurisdiction, and the cause shall be continued; and, in such cases, the Attorney General, or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may petition for recovery of civil penalties and any other equitable relief deemed needed or proper.

(b) In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared unlawful by section 3 of this act, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars ($1,000) per violation, which civil penalty shall be in addition to other relief which may be granted under sections 4 and 4.1 of this act. Where the victim of the wilful use of a method, act or practice declared unlawful by section 3 of this act is sixty years of age or older, the civil

penalty shall not exceed three thousand dollars ($3,000) per violation, which penalty shall not be in addition to other relief which may be granted under sections 2 or 4.1 of this act.

§ 201-9. Forfeiture of franchise or right to do business; appointment of receiver

Upon petition by the Attorney General, the court having jurisdiction, may, in its discretion, order the dissolution, suspension or forfeiture of the franchise or right to do business of any person, firm or corporation which violates the terms of an injunction issued under section 4 of this act. In addition, the court may appoint a receiver of the assets of the company.

§ 201-9.1. Powers of receiver

When a receiver is appointed by the court pursuant to this act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys, and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description of the person or persons for whom the receiver is appointed, received by means of any practice declared to be illegal and prohibited by this act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained provable losses. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

§ 201-9.2. Private actions

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action, to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper.

(b) Any permanent injunction, judgment or order of the court made under section 4 of this act shall be prima facie evidence in an action brought under section 9.2 of this act that the defendant used or employed acts or practices declared unlawful by section 3 of this act.

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JUL 29 1998
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SUPREME COURT, U.S.

No. 98-2

In The

Supreme Court of the United States

October Term, 1997

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

RICHARD SABO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the decision of the Third Circuit which held that Pennsylvania's law regulating trade practices in the business of insurance is not invalidated, impaired, or superseded under the McCarran-Ferguson Act [15 U.S.C. § 1012(b)] by a federal Racketeer Influenced and Corrupt Organizations Act claim, (hereinafter "RICO") [18 U.S.C. § 1964(c) (Supp. I 1995)], alleging unfair and deceptive sales practices in the sale of life insurance, where the state regulatory scheme, like RICO, expressly allows for private rights of action, the remedies available to victims under state law consist of a full panoply of damages, including treble damages, substantial exemplary damages and attorneys fees, and where the State's legislative policy clearly does not favor administrative enforcement over private lawsuits as a means of redressing the harm caused by fraudulent insurance practices.

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REPORT OF OPINIONS BELOW

The opinion of the court of appeals is reported as *Sabo v. Metropolitan Life Insurance Company*, 137 F.3d 185 (3rd Cir. 1998). The District Court's opinion, also entitled *Sabo v. Metropolitan Life Insurance Company*, No. Civ. A.94-307, 1995 U.S. Dist. WL 928256 (W.D. Pa. Jan. 4, 1995) is not officially reported. The decisions of both courts are included in the petition for certiorari of the Petitioner.

STATEMENT OF JURISDICTION

The decision upon which Petitioner seeks review was entered by a panel of the Third Circuit Court of Appeals on February 23, 1998, and petition for rehearing with suggestion for rehearing *en banc* was denied on March 31, 1998. Metropolitan Life Insurance Company (hereinafter "MetLife") submitted a Petition for Writ of Certiorari to this Court on June 29, 1988. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) (1998), to review that decision as stated therein by Petitioners. Respondent brings this opposition to MetLife's petition pursuant to Rule 15 of the Rules of the Supreme Court of the United States.

The Third Circuit Court of Appeals exercised jurisdiction over federal claims pursuant to 28 U.S.C. § 1331 (1998) and over supplemental state tort claims under 28 U.S.C. § 1367 (1998). Its appellate jurisdiction arose under 28 U.S.C. § 1291 (1998) to review District Court final orders. The District Court exercised jurisdiction pursuant to 28 U.S.C. § 1331 (1998) and the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B) (1998).

STATUTES AT ISSUE

MetLife's petition addresses principally the interpretation of section 2(b) of the McCarran-Ferguson Act, which provides, in pertinent part:

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1998).

Federal civil remedy provisions of the Racketeer Influenced and Corrupt Organizations Act are also implicated by this petition, as are civil remedy provisions of the Pennsylvania Unfair Insurance Practices Act (hereinafter "UIPA"), Act of July 22, 1974, P.L. 589, No. 205 § 1, *et seq.*, 40 P.S. § 1171.1, *et seq.* and the Pennsylvania Unfair Trade Practices Consumer Protection Law (hereinafter "CPL"), Act of Dec. 17, 1968, P.L. 1224, No. 387 § 201, *et seq.*, 73 P.S. § 201-1, *et seq.* The full text of the pertinent statutory provisions of these statutes are set forth in Appendix C of Met Life's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In 1988, Respondent, Richard Sabo (hereinafter "Sabo") became a representative of MetLife selling life insurance to customers. During his employment, he learned that a group of management-level sales agents had embarked upon two (2) schemes to defraud then current MetLife policyholders.

Under the first scheme, called "churning," the representatives were encouraged to identify policyholders with substantial cash

surrender values ("juice") in their policies. The policyholders would then be approached by the representative and/or the management-level sales agents who convinced them to use the cash surrender value to purchase other insurance policies, thereby generating commissions for the sales personnel.

Many of the victims of churning were elderly couples for whom new life insurance policies were expensive and unnecessary. The scheme was implemented through false and misleading statements whereby policyholders would be led to believe that the new policies would be supported entirely by the cash value of the existing policies so that there would be no premiums due. In most cases, however, the cash value of the existing policies were insufficient to cover the premiums for the new policies and customers began receiving unexpected premium bills.

In addition to this scheme, Sabo learned of at least one other fraudulent scheme perpetrated by MetLife sales agents. This scheme was called the "50/50 plan," and involved misrepresenting life insurance policies as savings accounts.

Sabo soon realized that these schemes were perpetrated not only by a small group of agents but had become a company-wide program, condoned at the very highest levels of MetLife's management. The prime perpetrators of these schemes were the individual defendants in the District Court - Antonino, Sherman and Schram.

Sabo, however, refused to participate in these schemes. He refused to allow the sales agents to have access to those of his policyholders whose policies had "juice." Moreover, when he received a complaint about churning from a policyholder, he directed the policyholder to the Pennsylvania Insurance Commission. When Antonino learned of the Insurance

Commission complaint, he confronted Sabo and embarked upon a campaign of intimidation, retaliation and defamation. Sabo was demoted. He was deprived of his clients, his commissions income and his manger's income. Ultimately, he lost his job and the investment he had made in the development of his customer base.

After Sabo was fired, he was subject to an ongoing pattern of retaliatory action by MetLife. The retaliation included efforts by MetLife to interfere with Sabo's relationships with his customers, to spread false rumors and defamatory information and, in general, to make life miserable for him.

In 1994, as a consequence of the complaints from policyholders sent to it by Sabo, the Insurance Commission, following an extensive market survey investigation, fined MetLife One Million Five Hundred Thousand ($1,500,000) Dollars.

In 1994, Sabo caused to be filed in the United States District Court for the Western District of Pennsylvania a Complaint asserting claims under RICO. Sabo claimed RICO violations against him occurring both when he was an employee and after he was fired. Sabo also filed a RICO Case Statement outlining with great detail the fraudulent schemes.

Sabo charged in his RICO Case Statement that the two (2) schemes constituted two (2) patterns of racketeering activity in violation of 18 U.S.C. §§ 1962(a), (b) and (c). He also charged the existence of a third scheme involving the encouragement of sales representatives to invest their own money in the development of a customer base. This investment of their own money made the representatives particularly vulnerable to control by MetLife. If the representative refused to go along with the other schemes after developing a customer base, he or she lost

that investment, along with his or her own income and employment.

Upon motion of MetLife, the Honorable Gary Lancaster dismissed the RICO claims as violative of section 2 of the McCarran-Ferguson Act.

On appeal, the Court of Appeals for the Third Circuit reversed, holding that in Pennsylvania, the McCarran-Ferguson Act does not prohibit a RICO action against an insurance company for the conduct of which Sabo complained.

The Third Circuit compared RICO with the law of Pennsylvania regulating the business of insurance and found that both provided for private rights of action for the conduct alleged by Sabo. While the Pennsylvania UIPA was not intended to confer a private right of action to *enforce* its provisions, UIPA specifically and expressly preserved private rights of action which existed under other laws and decisions, including the Pennsylvania Consumer Protection Law, and judicial decisions allowing actions for common law fraud and deceit in cases where persons are victimized by illegal insurance practices.

Looking to the teaching of this Court in *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453 (1969), the Third Circuit saw no invalidation, impairment, or supersedence of Pennsylvania insurance law by the allowance of RICO claims. Further, the Third Circuit found no indication that the Pennsylvania legislature favored administrative enforcement to the exclusion of private damages actions. It therefore saw "no reason why a federal private right of action cannot co-exist with the UIPA in these circumstances." *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 195.

MetLife petitions this Court for certiorari, contending that the instant case presents an alleged conflict among the courts of

appeals. MetLife argues that: (1) the Third Circuit's decision contravened the purpose and intent of the McCarran-Ferguson Act; (2) the Third Circuit's conflict analysis is contrary to the plain meaning of McCarran-Ferguson; (3) The Third Circuit erred in holding that RICO's remedies would not impair Pennsylvania Insurance Law; and (4) RICO remedies would undermine state insurance regulation.

Sabo urges this Court to deny MetLife's Petition for Certiorari. In doing so, Sabo contends that: (1) the Third Circuit decision is not in conflict with the decision of any other circuit court; (2) the allowance of a RICO claim in the context herein would not "invalidate, impair, or supersede" state insurance law; (3) that the Pennsylvania insurance law allows for *both* private rights of action to remedy insurance fraud as weil as remedies in the form of treble and exemplary damages which may be even more severe than the treble damages awardable under RICO; and, (4) the Third Circuit correctly decided the instant case.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE SIMPLY BECAUSE CERTIORARI WAS GRANTED IN *HUMANA*.

Initially, MetLife asks this Court to grant its petition because it says this case presents a better opportunity to resolve the alleged conflict among the circuits than the case of *Humana v. Forsyth*, 114 F.3d 1167 (9th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998), on which this Court granted certiorari. (Pet. for Writ of Cert. pg. 7). Contrary to MetLife's contention, however, this case does *not* present substantially

the same question with respect to which this Court granted certiorari in *Humana*. Accordingly, this Court's grant of certiorari in *Humana* provides no reason to grant certiorari in this case.

MetLife contends that the instant case "presents the conflict in the Courts of Appeals even more directly and compellingly than *Humana*," pointing out, in Footnote 6, that the *Humana* Court may have *erroneously assumed* that the Nevada insurance statues do *not* provide a private right of action, whereas, the Pennsylvania insurance statute [UIPA] "*clearly* does *not allow* for a private right of action." (Pet. for Writ of Cert. pg. 6, fn. 6) (emphasis supplied).

Presumably to MetLife, the fact that the UIPA "clearly does not allow for a private right of action" makes the instant case a better one for this Court to review. (Pet. for Writ of Cert. pg. 6, fn. 6).

MetLife's contention in this regard, however, is wrong. Its position in effect constitutes an implied admission that the instant case is not an appropriate vehicle for this Court to review the reach of the McCarran-Ferguson Act. Since UIPA *does* in fact expressly allow for a private right of action for insurance fraud, the issue which MetLife wishes this Court to review is not present.

While the provisions of UIPA provide for administrative action and have been held not to permit a private party to bring a private action under UIPA itself, UIPA nevertheless, by its *express terms*, *allows for* private causes of action for victims of insurance fraud available under other Pennsylvania statutes and decisional law, including the Pennsylvania CPL and common law actions for fraud and deceit. (*Cf. Wright v. North Am. Life Assurance Co.*, 539 A.2d 434 (Pa. Super. 1988)).

Section 1171.13 of UIPA, headed "Provisions of act additional to existing law," says:

> The powers vested in the Commissioner by this act are additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, act or practices declared to be unfair and deceptive.

40 P.S. § 1171.13.

As the Third Circuit correctly held, the Pennsylvania framework of insurance regulation includes and allows for private rights of action under the state's consumer protection law and common law of fraud and deceit. (*Cf. Pekular v. Eich*, 513 A.2d 427 (Pa. Super. 1986)).

Moreover, MetLife recognized this fact but chose to bury its recognition in a footnote, in which also it sought to make unsubstantiated distinctions between RICO and Pennsylvania common law with regard to *discretionary* versus *mandatory* remedies and burdens of proof. (Pet. for Writ of Cert. pg 16, fn.9).

Given the availability of *substantial* exemplary damages and attorneys fees under Pennsylvania's consumer protection law (*See infra*, Point III, below) to victims of insurance fraud, it is difficult to believe that the fact that RICO's treble damages are mandatory or that there is a different burden of proof would imbalance the regulatory scheme represented by Pennsylvania law. MetLife does not enlighten us on how this would happen. In fact, Pennsylvania has shown no determination to limit damages awardable to the victims of insurance fraud against insurers.

Since *both* RICO and the Pennsylvania insurance statute allow for private rights of action to redress insurance fraud, the instant case does *not* provide an opportunity to decide the same question as was presented by *Humana*, which dealt with a statute which *expressly limited* jurisdiction over trade regulation of insurance to the insurance commissioner.

The difference between the state statutes at issue in *Humana* and *Sabo* makes it clear that *Sabo* does not require review by this Court.

Contrast Pennsylvania's statute with Nevada's, which says:

> Notwithstanding any other provision of law, *the commissioner has exclusive jurisdiction* in regulating the subject of trade practice in the business of insurance.

Nev. Rev. Stat. § 686 A. 015 (emphasis supplied).

As recognized by the Court of Appeals in *Humana*, Nevada gave "exclusive jurisdiction" to regulate the *trade practices* of the business of insurance to the Commissioner of Insurance. (*Humana*, 114 F.3d at 1480) Nev. Rev. Stat § 686 A.015. (An area in which the Nevada legislature appears to have given a private right of action is in the area of claim *settlement*. Nev. Rev. Stat. § 686 A.310, *not* trade practices).

Accordingly, *Humana* fairly raises the questions of whether a RICO private right of action would invalidate, impair, or supersede a state regulatory scheme in which redress is *expressly limited* to administrative remedy and private rights of action for fraudulent insurance practices is prohibited.

That question is *not* raised in the instant case.

By contrast, Pennsylvania's statutory scheme for regulating *trade practices*, like RICO, *allows* for private rights of action, compensatory, treble and substantial exemplary damages and attorney fees.

The Pennsylvania Superior Court has noted that it sees no inconsistency between the UIPA providing for administrative investigation and an imposition of limited penalties and the CPL providing a means by which a consumer may privately seek compensation for wrongs allegedly suffered:

> Our conclusion that there is no inherent irreconcilable conflict is supported by the fact that the UIPA contains *no provision either stating or implying* that the power vested in the Insurance Commissioner represents the *exclusive means* by which an insurer's unfair or deceptive acts are to be penalized *or that the insured is precluded from seeking private compensation* for damages incurred. Further, we are mindful of the fact that our Legislature did not see fit to exclude insurers, insurance agents or insurance transactions from the broad scope of CPL regulation in either the original enactment of the CPL in 1968 or, more importantly, in its subsequent reenactment in 1976, a full two years *after* the enactment of UIPA.

Pekular, 513 A.2d at 433-34 (emphasis supplied).

The Superior Court, like the Third Circuit, detected no legislative intent in Pennsylvania to invest insurance companies with special protection from private causes of action leading to substantial damages, including treble and exemplary damages and attorney's fees:

> We believe that the Legislature has determined that an insured, like any other consumer, may seek compensation for damages incurred as a result of unscrupulous conduct under the provisions of the CPL and that *the limited penalties of the UIPA do not represent the sole and exclusive deterrent to alleged unfair or deceptive acts of insurers and their agents.*

Pekular, 513 A.2d at 434 (emphasis supplied).

Pennsylvania litigants, therefore, are encouraged by the legislature to run to the courthouse, rather than turn to the state insurance department for redress.

Such encouragement does not, in fact, impair the ability of the Insurance Commission to regulate. In the instant case, the availability of private remedies for the conduct complained of did not hamper the Insurance Commissioner in its ability to conduct a Market Conduct Examination and fine MetLife One Million Five Hundred Thousand ($1,500,000) Dollars for the very schemes Sabo sued over.

MetLife's contention that this Court should grant its petition because it granted certiorari in *Humana* is wrong and should be rejected.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE THIRD CIRCUIT AND THE DECISIONS OF THE OTHER CIRCUITS.

MetLife acknowledges and Sabo agrees that a writ of certiorari is appropriate where "a United States court of appeals has entered *a decision in conflict* with the decision of another

United States court of appeals on the same matter." Sup. Ct. R. 10(a) (emphasis supplied).

MetLife argues that courts of appeals are in *direct conflict* on the issue of RICO applicability relative to the individual state laws governing insurance. (Pet. for Writ of Cert. pg. 6). Further, MetLife asserts that a resolution be had in the interests of resolving an *"issue of national concern." Id.*

MetLife's assertion that a *"direct conflict"* exists among appellate courts amounts to a self-serving over-simplification.

Although the conclusions derived by circuit courts considering the question of civil RICO in the context of the McCarran-Ferguson Act seem to lack in uniformity, the result-oriented analysis is not indicative of a *"direct conflict"* among appellate courts. Moreover, that does *not* mean that the decision of the Third Circuit in this case conflicts with a decision of another circuit court.

The differences are not surprising in view of the operative purpose underlying the McCarran-Ferguson Act. A practical view and consistent application of the McCarran-Ferguson Act dictates that different *decisions* will occur not only between the circuits, but within the circuits.

It is to be expected that, where each state may adopt its own independent regulatory scheme for the enforcement of insurance laws, the rights and liabilities of the parties will vary between those states as a function of that diversity. This is the very reason that Congress adopted the McCarran-Ferguson Act.

It is, in view of each state's right to enact its enforcement framework, unrealistic to expect the establishment of a single policy governing the applicability to RICO of insurance law in

all fifty (50) states. Some states will rely on administrative enforcement; some states will not.

Such an expectation, implemented in court decisions, would directly contravene the very authority, subject to the stated limitations, specifically reserved to the several states under the McCarran-Ferguson Act.

The McCarran-Ferguson Act is a statute of distinction, not commonality. It is axiomatic that a blanket approach is contrary to the implementation of an act designed to preserve the diversity of state power.

Nevertheless, other circuit courts have embarked upon different analyses in attempting to deal with McCarran-Ferguson in the RICO context. The First, Seventh and Ninth Circuit Courts of Appeals have used the so-called direct conflict analysis. *See Villafane-Neriz v. FDIC*, 75 F.3d 727, 736 (1st Cir. 1996) (Assessing whether FDIC regulations are precluded by McCarran-Ferguson Act); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir. 1992) (Assessing whether Fair Housing Act is precluded by McCarran-Ferguson Act and commenting that "federal regulation of a subject . . . does not prevent states from adding remedies to the arsenal established by federal law.")[1]; *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1491-92 (9th Cir. 1995) (Congress did not intend to entirely cede the field of insurance); and, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1480 (9th Cir. 1997) (That RICO permits plaintiffs to

1. In its application of the direct conflict analysis (*i.e.*, State and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other) the Seventh Circuit relied on this Honorable Court's holding in *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984) (States may provide penalties for violating provision of state law relating to nuclear power even though federal law otherwise preempts field).

maintain a private right of action for conduct proscribed by Nevada's administrative scheme does not create a conflict between state and federal law), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) and (No. 97-303, October Term, 1997).

Other circuit courts have used the so-called "upset the balance" analysis. The upset the balance approach is premised on the proposition that a federal law *may* "invalidate, impair, or supersede" state law based solely on the existence of greater remedies under the federal law, *even if the federal law and the state law are alike in terms of the substantive conduct which they prohibit.*

Arguably, the Fourth, Eighth, and to a certain extent the Sixth Circuit Courts of Appeals have indicated a *willingness* to accept an upset the balance approach. *See Ambrose v. Blue Cross & Blue Shield of Virginia*, 891 F. Supp. 1153, 1166-68 (E.D. Va. 1995), *aff'd without opinion*, 95 F.3d 41 (4th Cir. 1996) (Prospect of enhanced damages under RICO would diminish the state enforcement mechanism); *Doe v. Northwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1307 (8th Cir. 1997) (Intrusion of RICO's substantial damage provisions into a state's insurance regulatory program may impair state law and bar application of RICO); *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996) (RICO and state laws conflicted in substantive reach and in remedies).

Irrespective of the analytical approach, however, any anti-preemptive analysis in the context of the McCarran-Ferguson Act requires an evaluation of whether application of a federal statute, in this case RICO, impacts in *one of three* specifically enumerated ways a particular state law scheme. If the application of a federal law (one not specifically addressing the business of insurance) would *invalidate, impair, or supersede* the state law, then the federal law is pre-empted by the state law.

It is logical to assume that a direct conflict analysis is a prerequisite to an upset the balance analysis. Practically speaking, if the substantive provisions of a state and federal law are in conflict or asymmetrical, then an *invalidation* is imminent. If federal law permits conduct that state law prohibits, upon observing the dissimilarities, no further analysis *need* be made.

However, upon finding that the substantive provisions of a federal and state law are similar, further analysis *may* be done to ascertain, whether the application of the federal law would *impair* or *supersede* the state law. The Third Circuit in the instant case performed that analysis.

The decision of the Third Circuit in this case is *not* in "*direct conflict*" with a decision entered by *any other* United States court of appeals respecting the statutory construction of "invalidate, impair, or supersede" as contained in the McCarran-Ferguson Act relative to a preemptive analysis.

The Third Circuit's decision that the availability of remedies to a private litigant under the federal RICO statute does not "invalidate, impair, or supersede" Pennsylvania's comprehensive system of state insurance regulation, which also includes private rights of action and exemplary damages, was based on its full-scale comparative analysis of both substantive and remedial provisions of the federal and state law. Therefore, the decision entered by the Third Circuit is not in conflict with a decision entered by any other circuit court in view of the Third Circuit's integrated analytical approach.

A. Pennsylvania's Comprehensive Legal Framework Regulates the Business of Insurance Only to the Extent Permitted Under the McCarran-Ferguson Act.

There is no dispute but that Pennsylvania enacted its Unfair Insurance Practices Act, for the purpose of exercising its *full*

regulatory authority under the McCarran-Ferguson Act. 40 Pa. S. § 1171.2 (1992).[2]

The McCarran-Ferguson Act did not cede *all* regulatory power over the insurance business to the states. That Act, in relevant part, provides that:

> *No Act of Congress* shall be construed to invalidate, impair, or supersede any law enacted by any State . . . , *unless such Act* specifically relates to the business of insurance . . .

15 U.S.C. § 1012(b)(2) (emphasis supplied).

The Congressional intent is plain and unambiguous — Congress expressly reserved to the federal government certain powers to regulate the business of insurance and, therefore, the Act may not reasonably be construed to have granted the states unfettered regulatory power. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) (The starting point in the Act's interpretation [statutory construction] is the

---

2. That provision, in relevant part, states that:

> § 1171.2. Declaration of purpose
>
> The *purpose* of this act is to *regulate* trade practices in the *business of insurance in accordance* with the intent of Congress as expressed in the *act of Congress of March 9, 1945* (Public Law 15, 79th Congress) [McCarran-Ferguson Act], by defining or providing for the determination of all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting trade practices so defined and determined.

40 P.S. § 1171.2 (emphasis supplied).

language of the statute itself) and *Sabo v. Metropolitan Insurance Company*, 137 F.3d 185, 223-26 (3rd Cir. 1998).

Sabo agrees with the Ninth Circuit's observations relative to the Congressional intent that the Act not be read as *excluding* all federal regulation within the business of insurance. Those anti-preemptive observations include the following:

> (1) The Act's exemption of federal laws which specifically relate to the business of insurance weighs against a congressional intent wholly to abandon the field to the states;
>
> (2) Only federal statutes which "invalidate, impair, or supersede" state insurance statutes are "preempted"; and,
>
> (3) If Congress had intended to cede the field, it could have readily provided that no federal statute shall be construed to apply to the business of insurance.

Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., 50 F.3d 1486 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995).

Pennsylvania legislators recognized the limitation upon state powers to regulate the business of insurance and, accordingly, the UIPA impliedly declares that it does not regulate the business of insurance to the *exclusion* of federal regulation.

Moreover, the UIPA's carefully crafted Declaration of Purpose evidences the state legislature's consideration of and acknowledgment that in some instances both federal and state law could collectively "regulate the business of insurance" without invalidating, impairing, or superseding a state law. That

conclusion can be had in view of the Pennsylvania Legislature's express acknowledgment of the parameters of its power to regulate to the extent permitted by Congress within the confines of the McCarran-Ferguson Act.

B. Pennsylvania's Comprehensive Regulatory Framework is Not One of Exclusive Administrative Enforcement and Does Not Usurp its Citizens' Rights to Substantial Civil Remedies.

The UIPA is not the only enforcement mechanism by which Pennsylvania regulates the trade practices of insurance. The UIPA vests broad enforcement powers in the Commonwealth's Insurance Commissioner, but expressly preserves the availability of private remedies to Pennsylvania citizens.

The UIPA does not permit private litigants to enforce its provisions. As MetLife readily admits, however, Pennsylvania "expressly incorporates into its regulatory framework [UIPA] pre-existing common law and statutory causes of action, such as common-law fraud and CPL [Consumer Protection Law] claims." (*See* Pet. for Writ of Cert., pg. 16, fn. 9, *citing* 40 Pa. S. § 1171.13 and *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 58 (3d Cir. 1992)).

Similarly, the Third Circuit recognized that Pennsylvania's failure to permit a private remedy under the UIPA cannot be construed to mean that Pennsylvania has adopted a state policy of exclusive administrative enforcement. *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 195.

Further confirming the continuing ability of Pennsylvania citizens to seek civil redress and evidencing a *non-exclusive*[3] administrative enforcement policy is the fact that Pennsylvania

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3. Compare to statutory language in *Humana.*

courts have not barred common law actions for fraud and deceit arising out of insurance practices. *See Wright v. North Am. Life Assurance Co.*, 539 A.2d 434, 438 (Pa. Super. 1988) (Common law actions permitted despite no express provision for private causes of action under UIPA).

In addition to common law actions for fraud and deceit, a Pennsylvania aggrieved insured may seek civil redress and substantial damages under the Pennsylvania CPL. *Pekular v. Eich*, 513 A.2d 427, 432-41 (Pa. Super. 1986). The remedial provisions provided thereunder permit a court to award damages "up to three times the actual damages sustained" as well as attorneys fees. *Sewak v. Lockhart*, 699 A.2d 755 (Pa. Super. 1997).

An aggrieved insured, under common law causes of action for fraud and deceit, may seek substantial relief in the form of punitive damages. Although punitive awards are discretionary, the very nature of the tort of fraud is one which *ipso facto* falls within the ambit of outrageous conduct and, therefore, it is probable that a punitive award will follow upon the finding of liability in the context of fraud. *See Martin v. Johns-Mansville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985) (Punitive damages are available in circumstances involving outrageous conduct).

In any event, while punitive damages are discretionary, their imposition upon a defendant insurance company or agent for fraudulent conduct is certainly possible and foreseeable. Clearly, therefore, the legislature recognized and accepted the possibility and even the likelihood that in a case like *Sabo*, if brought under *state* law, a very large punitive award *could* be entered, in addition to the entry of an award of legal fees. Such an award could easily exceed the treble damage award called for under RICO.

C. RICO is Substantively Parallel to the UIPA.

The UIPA prohibits persons from engaging in unfair or deceptive practices in the business of insurance. 40 S. §§ 1171, *et seq*. The UIPA sets forth an exhaustive list of activity in section 1171.5 as deceptive or unfair practices forbidden under section 1171.4. *Id.*

RICO does not specifically address insurance practices, but prohibits unfair and or deceptive practices. Respondent Sabo, a former MetLife sales representative, filed suit under RICO asserting predicate acts based on deceptive insurance sales practices by MetLife in Pennsylvania (*See* discussion, *infra*).

Both RICO and the UIPA prohibit persons from engaging in unfair or deceptive practices. Accordingly, the Third Circuit Court of Appeals saw no direct conflict in the substantive provisions contained in the UIPA and those contained in RICO. Hence, the Third Circuit determined that RICO is substantively parallel to Pennsylvania's UIPA. *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 192-294. This determination is correct. The conduct alleged by Sabo would be prohibited under both RICO and UIPA.

D. RICO Does Not Invalidate, Impair, or Supersede Pennsylvania's Comprehensive Regulatory Framework.

The Third Circuit observed the symmetry between the substantive provisions of RICO and those of the UIPA. *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 195. The symmetry and absence of conflict[4] between the two statutory

4. The Appellate Court defined "invalidate" as follows:

> . . . to weaken or make valueless . . .

Sabo v. Metropolitan Insurance Company, 137 F.3d 185, 193, n.5 (3rd Cir. 1998) *citing*, Webster's Third New International Dictionary 1199, 1131, 2295 (1986).

mechanisms resulted in the Third Circuit's decision that applicability of RICO in this case would not *invalidate* Pennsylvania's state laws governing insurance. *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 194-195.

The Third Circuit, however, did not end its analysis upon its determination that no direct conflict existed (*i.e.*, no invalidation). It further engaged in an analysis of whether a RICO claim would *impair* or *supersede* state law. The Third Circuit correctly noted that a fair and reasoned reading of the UIPA, along with reference to legislative intent or judicial interpretation, would *not* support a conclusion that Pennsylvania legislators intended a state policy based on exclusive administrative enforcement, *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 195. In other words, permitting a private litigant to seek civil redress under RICO provisions would not impair or supersede Pennsylvania's regulatory framework governing the business of insurance.

Moreover, the Third Circuit concluded that the Legislature's awareness of the availability of civil redress under common law claims of fraud and deceit, along with availability of remedies under Pennsylvania's Consumer Protection Law, and acquiescence to their co-existence with UIPA disfavored any suggestion that Pennsylvania legislators intended a policy of exclusive[5] administrative enforcement. The availability of a private right of action under RICO did not, in the view of its lawmakers, impair, or supersede Pennsylvania's administrative framework.

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5. Compare and contrast the state statutes of Pennsylvania and Nevada. *See* discussion, *infra*.

III.

THE PRIVATE ACTION REMEDIES UNDER RICO DO NOT MATERIALLY DIFFER FROM THOSE AVAILABLE UNDER PENNSYLVANIA LAW AND DO NOT UNDERMINE STATE INSURANCE REGULATION.

MetLife argues that the mandatory treble damages and attorney fees available to a litigant under RICO would impair the balance that Pennsylvania seeks to strike among the many concerns and interests underlying insurance regulation. (Pet. for Writ of Cert. pg. 24).

MetLife suggests that allowing RICO claims would impair the regulatory framework and undermine Pennsylvania's legislative policy determinations regarding appropriate sanctions required to deter deceptive insurance sales practices. MetLife believes that wronged policyholders would turn to RICO suits instead of pursuing administrative channels of relief.

MetLife's contentions in this regard are wrong for two reasons: (1) the balance struck by the legislature in Pennsylvania contemplated the full preservation of private rights of action for insurance fraud (*Cf.* § 1171.13, "Provisions of act additional to existing law"); and (2) such private rights of action come with a full panoply of remedies, including *treble damages and attorneys fees* under the Pennsylvania Unfair Trade Practices and Consumer Protection Act *and punitive damages* under Pennsylvania's common law of fraud and deceit. (*Cf. Delahanty v. First Pennsylvania Bank, N.A.*, 464 A.2d 1243 (Pa. Super. 1983)). In other words, MetLife's contention that Pennsylvania's legislative policy favors administrative enforcement of law regulating insurance practice is simply in error.

Moreover, under Pennsylvania law, as interpreted by its Supreme Court, there need be *no* relationship between the

amount of compensatory damages and the amount of punitive damages awarded to a successful litigant. In fact, under Pennsylvania law the salient factor in determining an adequate punitive damage award is the wealth of the defendant (*Cf. Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989) (Approving punitive damages that were ten times compensatory damages)).

The possibility exists under Pennsylvania law, as the legislature must have known, that a defendant in an insurance fraud case, who might be subject to a limited fine by the Insurance Commissioner, could be hit with a large punitive damage award substantially more than three time compensatory damages.

Accordingly, all the motivation which a litigant needs to circumvent the administrative channels of relief is *already* built into Pennsylvania's statutory scheme of insurance regulation. The Pennsylvania legislature obviously did this on purpose.

If the Pennsylvania legislature believes that the potential for large punitive damage awards against insurance companies or insurance agents does not upset the balance that it struck between administrative enforcement and judicial action, can this Court say that Pennsylvania is wrong?

McCarran-Ferguson permits the individual states to strike their own balances in regard to the regulation of insurance trade practices. Pennsylvania has done so. The Third Circuit's decision is strictly in accordance with that balance.

CONCLUSION

For the foregoing reasons, this Court should deny MetLife's Petition. The decision of the Third Circuit properly analyzed and compared RICO with the Pennsylvania insurance trade practice regulatory framework and correctly concluded that: (1) the substantive provisions are parallel; and (2) the balance struck by the Pennsylvania legislature between administrative and judicial enforcement would not be upset by the allowance of a private action under RICO. The Third Circuit correctly concluded, therefore, that allowance of a RICO claim for insurance fraud would not "invalidate, impair, or supersede" state law under McCarran-Ferguson.

Moreover, the fact that this Court has granted certiorari in *Humana v. Forsyth* is no reason to grant certiorari in the instant case since the issues presented by the two cases are significantly different. In *Humana*, state law *prohibits* private rights of action to redress fraudulent insurance trade practices. In the instant case, state law *expressly allows* private rights of action.

Accordingly, Sabo urges this Court to deny certiorari and permit this case to be returned to the District Court for further proceedings consistent with the opinion of the Third Circuit.

July 29, 1998

Respectfully submitted,

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No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

METROPOLITAN LIFE INSURANCE COMPANY, *Petitioner*,

v.

RICHARD SABO, *Respondent*.

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO EXPEDITE RESOLUTION OF PETITION FOR CERTIORARI AND TO SCHEDULE ORAL ARGUMENT ON THE SAME DAY AS *HUMANA INC. V. FORSYTH*, No. 97-303

Respondent Richard Sabo, (hereinafter "Sabo"), through its counsel, respectfully opposes Petitioner's Motion to Expedite Resolution of Petition for Certiorari and further opposes the consolidation of argument with *Humana Inc. v. Forsyth*, ____ U.S. ____, 66 U.S.L.W. 3793 (No. 97-303).

Respondent recognizes that cases can be advanced for oral argument to any extent necessary where the matter is an important and urgent one. Traditionally, this Court has granted such expedition only in cases of serious urgency, predominantly involving immediate and irreparable harm to individual constitutional rights or public projects. *See, Power Authority v. Tuscarora Indian Nation*, 360 U.S. 915, 361 U.S. 892 (1959), 362 U.S. 99 (1960) (in which oral argument was advanced about a month on an asserted need to proceed

with the construction of a large power project); *United States v. Nixon*, 418 U.S. 683, 690 (1974) (where, following an expedited briefing schedule in an important case involving a presidential claim of executive privilege, oral argument was held five-and-a-half weeks after the grant of certiorari).

Petitioner avers no threat of immediate or irreparable harm to itself or another, either of great constitutional or public import. While it argues administrative convenience of the Court, petitioner fails to address the likelihood of prejudice to respondent.

This Court granted *certiorari* in *Humana Inc. v. Forsyth*, ____ U.S.____, 66 U.S.L.W. 3793 (No. 97-303) on June 22, 1998. Under the Supreme Court Rules, a briefing schedule has already been initiated. It is unlikely that this Court will consider the instant motion until its next scheduled conference of September, 1998. The parties have not considered or agreed upon the record, so a delay in printing is likely. Respondent does not, therefore, believe that the instant case can be fully and adequately briefed in such an abbreviated manner.

Petitioner seeks to direct this Court's attention to the pure conjecture of the United States Solicitor General. In the Solicitor General's *amicus brief* in support of *certiorari* in *Humana*, he posits that the Ninth Circuit may have based its decision, at least in part, on the incorrect assumption that Nevada's insurance statutes do not provide a private right of action *Metropolitan Life Insurance Company v. Sabo*, Doc. No 98-2, *Petition for Writ of Certiorari*, pg.6, fn 6 (6/29/98). Based upon this second-tier speculation, the Solicitor General concluded that, "Humana is not the 'ideal vehicle' for resolving the conflict in the Courts of

Appeals." Brief of United States as *Amicus Curiae* at 19, *Humana, Inc. v. Forsyth*, ___ U.S. ___, 66 U.S.L.W. 3793 (No. 97-303).

The primary basis which Petitioner asserts for expedition in this case is that consideration of these cases together "would give the Court a broader perspective." *Petitioner's Motion to Expedite Resolution of Petition for Certiorari and to Schedule Oral Argument on the Same Day as Humana Inc. v. Forsyth*, No. 97-303, pg. 2. It argues that, unlike Nevada, Pennsylvania has no private cause of action available under its state insurance law, then Petitioner has stated no basis for expedition.

From speculation upon speculation, Petitioner asserts with "authority" that, therefore, the possible inadequacy identified by the Solicitor General in *Humana* is not present in the instant case. Petitioner cites no authority, rule of statutory construction, or opinion of court. Rather, Petitioner asks this Court to embrace the opinion of a biased party as an authoritative basis for this Court's decision to grant *certiorari*.

Even if, the Ninth Circuit incorrectly decided *Humana* because it assumed that Nevada's insurance statutes do not provide a private cause of action, that factual assumption is not present in *Metropolitan*. The comprehensive Pennsylvania legal and regulatory framework governing the business of insurance does provide a private cause of action.

Consequently, petitioner could not have, with any degree of candor, couched its question in precisely the same terms as those used in *Humana*.

Humana's question, in pertinent part, is stated as follows: "...but the remedies provided [under the comprehensive state law frame work and RICO] are materially different." *Humana, Inc. v. Forsyth*, ___ U.S. ___, 66 U.S.L.W. 3793 (No. 97-303); *See*,

Petition for Writ of Certiorari, Question Presented, pg. i (8/18/97). Petitioner states the instant question, in pertinent part, as: "...RICO provides extraordinary mandatory remedies that are not available under the comprehensive state law framework and would upset the balance of remedies established by the lawmakers." *Metropolitan Life Insurance Company v. Sabo*, Doc. No 98-2, *Petition for Writ of Certiorari*, Question presented, pg.i (6/29/98).

Petitioner has been less than candid with the Court; it has proffered an incomplete recitation of the facts. Pennsylvania has adopted a comprehensive regulatory framework which provides both private and administrative causes of action, including civil remedies similar to those provided under the federal Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO")(18 U.S.C. § 1961 *et. seq.*).

The Third Circuit held that the adoption of the Pennsylvania Unfair Insurance Practices Act, 40 Pa. Cons. Stat. Ann. §§ 1171.1 to 1171.15 (West 1992) (hereinafter "UIPA") preserved common law actions for fraud and deceit arising out of insurance practices. *Sabo v. Metropolitan Life Insurance Company*, 137 F.3d 185 (3rd Cir. 1998).

More importantly, it found that the adoption of the UIPA preserves a private cause of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (hereinafter "UIPA and CPL"), 73 Pa. Cons. Stat. Ann. §201-1 to 201-9.2 (West 1993). Citing this Pennsylvania Statute, the Third Circuit expressly found that these statutes [UIPA and CPL] "provide a private remedy and treble damages for victims of insurance fraud." *Sabo v. Metropolitan Life Insurance Company*, 137 F. 3d 185 (3rd Cir. 1998).

Finally, petitioner argues that this Court is charged with establishing a single policy governing the applicability of RICO to insurance law in all 50 states. This argument is inherently flawed.

Under the *McCarren-Ferguson Act*, 15 U.S.C. § 1101 *et seq.*, different decisions will occur not only between the Circuits, but within the Circuits. It is expected that, where each state may adopt its own independent regulatory scheme for the enforcement of insurance laws, that the rights and liabilities of the parties will vary between those states as a function of that diversity. This is the very reason that Congress adopted the *McCarren-Ferguson Act*, 15 U.S.C. § 1101 *et seq*. If petitioner's proposition were carried to its logical conclusion, it would destroy the very authority reserved to the states under the *McCarren-Ferguson Act*.

Petitioner suggests that there is an issue of national concern solely upon the basis that, both, *Humana* and *Metropolitan* implicate RICO. Petitioner's focus is misplaced.

The *McCarren-Ferguson Act* is a statute of distinction, not commonality. It is axiomatic that a blanket approach is inappropriate and in direct contravention to the implementation of an act designed to preserve the diversity of powers reserved to the several states.

It is uncontested that *Humana* and *Metropolitan* involve two separate states with two completely separate frameworks for insurance regulation. This fact alone fundamentally distinguishes theses cases and demands their separate treatment.

The *McCarren-Ferguson Act* stands for nothing if not for the proposition that each state and its regulatory schemes must be treated autonomously and independently. This requires a case-by-case analysis of the particular facts and the legislative intent underlying

each individual state's comprehensive regulatory and statutory framework governing the business of insurance.

This Court is a court of policy and *certiorari* will be granted only when there are special and important reasons therefor. It is of critical import that the facts of *Humana* and *Metropolitan* not be intermingled. To do otherwise would confuse and obfuscate the issues in both cases and risk skewing or biasing the decision of this Court.

Wherefore, respondent prays that the Court deny Petitioner's Motion to Expedite Resolution of Petition and to Schedule Oral Argument on the same day.

Respectfully Submitted

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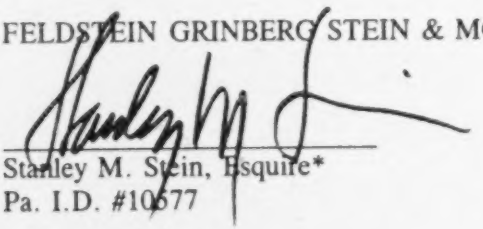

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IN THE

Supreme Court of the United States

October Term, 1998

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

v.

RICHARD SABO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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Farrokh Jhabvala, *The "Direct Conflict" Test for First Clause McCarran-Ferguson Cases*, 33 Tort & Ins. L. J. 1147 (1998) 3, 4

Petitioner Metropolitan Life Insurance Company ("MetLife") respectfully submits this reply brief in further support of its petition for certiorari. Contrary to plaintiff's contentions, this case presents substantially the same question with respect to which this Court recently granted certiorari in *Humana Inc. v. Forsyth*, 118 S. Ct. 2339 (1998) (No. 97-303): whether the availability of a civil RICO claim to challenge allegedly deceptive practices in the business of insurance would, in contravention of the McCarran-Ferguson Act, "invalidate, impair or supersede" state regulatory systems that govern the same alleged conduct and provide different -- and discretionary as opposed to mandatory -- remedies. As the Third Circuit recognized in its decision in this case, this issue, which affects insurance litigation nationwide, is the subject of conflicting decisions in the Courts of Appeals. MetLife respectfully submits that, in view of the importance of this issue, certiorari should be granted in this case as well as in *Humana* and that this Court should hear oral argument in the two cases on the same day.

ARGUMENT

I. THE CONFLICT AMONG THE COURTS OF APPEALS WARRANTS A GRANT OF CERTIORARI IN THIS CASE

In its opinion in this case, the Third Circuit acknowledged that "Courts of Appeals jurisprudence is in disarray as to the extent and meaning of invalidate, impair or supersede under the [McCarran-Ferguson] Act" and that, in particular, the issue of whether the McCarran-Ferguson Act precludes RICO claims based on insurance trade practices "divides sister Courts of Appeals." (App. 17a, 30a) Nevertheless, in his opposition to certiorari, plaintiff incorrectly asserts that there is no conflict between the Third Circuit's decision in this case that the McCarran-Ferguson Act permits RICO claims based on allegations of unfair insurance trade practices and the decisions of other circuits that have barred RICO claims under

McCarran-Ferguson. Plaintiff's assertion is contradicted by the Third Circuit itself, which expressly recognized that its decision was contrary to the decisions of the Eighth, Sixth and Fourth Circuits. *See Doe v. Norwest Bank*, 107 F.3d 1297 (8th Cir. 1997) (barring RICO claims); *Kenty v. Bank One*, 92 F.3d 384 (6th Cir. 1996) (same); *Ambrose v. Blue Cross & Blue Shield*, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996) (same), *aff'g*, 891 F. Supp. 1153 (E.D. Va. 1995).[1]

Plaintiff appears to argue that there is no conflict between these decisions because they address the effect of RICO on the insurance laws of different states. In fact, the different decisions reached by the Courts of Appeals are not based on variations in state law.[2] Rather, these different outcomes result from the conflicting interpretations by the Courts of Appeals of the McCarran-Ferguson Act's statutory language "invalidate, impair, or supersede." *See* 15 U.S.C. §1012(b).

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[1] *But see Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995) (permitting RICO claims); *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997) (same), *cert. granted*, 118 S. Ct. 2339 (U.S. 1998).

[2] Indeed, the Solicitor General noted in urging this Court to grant certiorari in *Humana* that the "divergent results cannot be entirely explained by reference to differences in the pertinent state insurance laws." *See* Brief of United States as *Amicus Curiae* at 8, *Humana Inc. v. Forsyth*, No. 97-303 (May 29, 1998) ("Amicus Br."). Rather, as the Solicitor General stated, "the divergent results appear to be the product of differing -- indeed, irreconcilable -- interpretations of the McCarran-Ferguson Act and the terms 'invalidate, impair, or supersede' in particular." *Id.* at 9.

The Third Circuit in this case and the Ninth Circuit in *Forsyth v. Humana Inc.*, 114 F.3d 1467 (9th Cir. 1997), *cert. granted*, 118 S. Ct. 2339 (1998), require a direct conflict between substantive provisions of state and federal law as a precondition to finding that a federal law invalidates, impairs or supersedes state insurance law and so have rejected the proposition that RICO's extraordinary mandatory remedies impair state insurance law.[3] In contrast, the Eighth, Sixth and Fourth Circuits have ruled that the disparity in remedies between RICO and state statutory or common law -- a disparity that has apparently existed in every case decided thus far on the application of RICO under the McCarran-Ferguson Act -- seriously and substantially impairs state law.[4] In short, the Courts of Appeals are in stark disagreement on this question, and that disagreement merits resolution by this Court.

Moreover, contrary to plaintiff's contentions, the question presented by the instant case is substantially the same question that is presented in *Humana Inc. v. Forsyth*, in which this Court recently granted certiorari, *i.e.*, whether the McCarran-Ferguson Act's prohibition of the invalidation, impairment, or supersedence of state insurance law precludes RICO claims where RICO's extraordinary mandatory remedies are not available under applicable state law. Plaintiff attempts

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[3] Contrary to plaintiff's assertion, the Third Circuit in this case clearly applied a conflict analysis in finding that the McCarran-Ferguson Act did not preclude RICO claims. *See, e.g.*, App. 34a ("We too cannot see the *conflict* in this case and find no invalidation, impairment, or supersedence" of Pennsylvania insurance law) (emphasis added); *see also* Farrokh Jhabvala, *The "Direct Conflict" Test for First Clause McCarran-Ferguson Cases*, 33 Tort & Ins. L. J. 1147, 1160-61 (1998) (Third Circuit in *Sabo* "substituted a test of incompatibility or direct conflict for a test of impairment").

[4] *See* cases cited in MetLife's Petition ("Pet.") at 12 n.8.

to differentiate this case from *Humana* by claiming that Nevada law gives sole authority over the regulation of insurance trade practices to the insurance commissioner of that state, while Pennsylvania law (at issue here) permits private rights of action under the common law and under Pennsylvania's Consumer Protection law. *See* Respondent's Brief in Opposition ("Resp. Br.") at 9. However, as the Solicitor General has pointed out, Nevada, like Pennsylvania, in fact allows common-law actions for fraud based on insurance trade practices. *See* Amicus Br. at 9 n.4. Moreover, neither state provides for mandatory treble damages and attorneys' fees in actions based upon allegedly deceptive insurance trade practices.

Contrary to plaintiff's contentions, MetLife does not urge that certiorari should be granted in the present case simply because certiorari was granted in *Humana*. Rather, the different factual and legal backgrounds of the two cases constitute a compelling reason for granting certiorari in this case in addition to *Humana*. The two cases address the effect of RICO on different state insurance laws and regulatory frameworks, as well as two different areas of insurance law -- life insurance sales practices and health insurance co-payments pursuant to an employee benefit plan governed by ERISA, 29 U.S.C. §§ 1001-1461.

Moreover, although this Court has in the past resolved certain issues raised by section 1012(b) of the McCarran-Ferguson Act, the Court has never had occasion to address the scope and intent of the statutory language "invalidate, impair or supersede." *See* Farrokh Jhabvala, *supra*, 33 Tort & Ins. L. J. at 1151-52 (1998) (criticizing direct conflict test). Hearing these two cases on the same day, as requested by MetLife, would give this Court a broader context in which to evaluate and define the statutory terms. As plaintiff acknowledges, the lower courts will face the issue as to whether RICO invalidates, impairs or supersedes state insurance regulatory systems in

various contexts and with respect to the laws of various states. *See* Resp. Br. at 12-13. Consideration by this Court of both *Humana* and the present case should provide the lower courts with more complete guidance. In sum, the differences between this case and *Humana* support this Court's granting certiorari in this case and hearing the two cases on the same day.

II. ALLOWING RICO CLAIMS CONTRAVENES THE PURPOSE AND PLAIN MEANING OF THE McCARRAN-FERGUSON ACT

In his opposition, plaintiff turns upside down the statutory purposes of the McCarran-Ferguson Act and Pennsylvania's Unfair Insurance Practices Act ("UIPA"). Plaintiff incorrectly argues that the McCarran-Ferguson Act was somehow intended to *limit* state powers and that in enacting the UIPA Pennsylvania "recognized the [McCarran-Ferguson Act's] limitation upon state powers to regulate the business of insurance" and "acknowledged" that "both federal and state law could collectively 'regulate the business of insurance.'" *See* Resp. Br. at 17. Plaintiff's view of the purposes and effect of these statutes is completely unsupported.

Contrary to plaintiff's contentions, Congress enacted the McCarran-Ferguson Act "to restore the supremacy of the States in the realm of insurance regulation." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). Indeed, the McCarran-Ferguson Act's Declaration of Policy states "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. Moreover, contrary to plaintiff's contentions, Pennsylvania enacted the UIPA, not in recognition of any limitation on its power to regulate insurance, but to "*occupy the field* of regulating the business of insurance

as contemplated by [the McCarran-Ferguson Act]." *Black v. Nationwide Mut. Ins. Co.*, 429 F. Supp. 458, 463 (W.D. Pa. 1977) (emphasis added), *aff'd mem.*, 571 F.2d 571 (3d Cir. 1978); *see also* 40 Pa. S. § 1171.2 (UIPA was intended to "regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the [McCarran-Ferguson] act").

Indeed, Congress in enacting the McCarran-Ferguson Act was concerned in particular with the effect of laws of general application such as RICO. Congress enacted the McCarran-Ferguson Act to protect state regulation of insurance from "inadvertent federal intrusion" through the application under the Commerce Clause of federal statutes that (like RICO) "describe[] an affected activity in broad, general terms, of which the insurance business happens to comprise one part." *Barnett Bank v. Nelson*, 517 U.S. 25, 39 (1996).

Plaintiff does not address the legislative history of the McCarran-Ferguson Act, which clearly shows that the protection provided to state insurance regulation encompassed more than merely barring the application of federal laws that *directly conflict* with state insurance law. *See* MetLife's Pet. at 14-15. The Third Circuit (like the Ninth Circuit before it) erroneously equated the McCarran-Ferguson Act's statutory language "invalidate, impair or supersede" with "conflict." (App. 34a). As shown in Point III of MetLife's Petition, the direct conflict test, which incorrectly imports the principles of federal preemption under the Supremacy Clause into the McCarran-Ferguson analysis, impermissibly creates a presumption in favor of the application of federal law to insurance matters. Thus, the anomalous result of the Third Circuit's decision is that principles of law that were designed to limit federal preemption of state law are employed to authorize federal intrusion into state regulation of the business of insurance.

This result is flatly contrary to the language and intent of the McCarran-Ferguson Act.

III. RICO'S EXTRAORDINARY, MANDATORY REMEDIES WOULD IMPAIR PENNSYLVANIA INSURANCE LAW

Plaintiff attempts to gloss over the fact that RICO's remedial provisions impose extraordinary mandatory penalties that have no counterpart under Pennsylvania statutory and common law. Rather, the causes of action available under Pennsylvania law provide discretionary as opposed to mandatory remedies.[5] In contrast to RICO's mandatory treble damages and attorneys' fees, under Pennsylvania law punitive damages are discretionary, subject to strict judicial controls, and available only in exceptional circumstances. S*ee Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985). Plaintiff entirely fails to acknowledge the interest that Pennsylvania (as well as other states) has in subjecting the reasonableness of extra-contractual punitive damages awards to the scrutiny and review of the courts.

Allowing plaintiffs to recover mandatory treble damages and attorneys' fees pursuant to RICO would circumvent and undermine Pennsylvania's comprehensive statutory and regulatory enforcement framework. As the Fourth Circuit made clear in *Ambrose*, "because of the dramatic disparity in the cause of action and remedies available to RICO plaintiffs, RICO would effectively supplant" state insurance law.

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[5] Plaintiff incorrectly asserts that the distinction drawn by MetLife between RICO's mandatory remedies and Pennsylvania's discretionary remedies is "unsubstantiated." *See* Resp. Br. at 8. On the contrary, the distinction is substantiated by well settled Pennsylvania statutory and decisional law that is cited and discussed in Point IV of MetLife's Pet.

Ambrose, 1996 U.S. App. LEXIS 22035, at *4; *see also United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir.) (RICO claims, with their severe, mandatory remedies, could wreak "potential havoc" on a state's "carefully considered mechanism for regulating insurance companies") (discussing *Doe*), *cert. denied*, 118 S. Ct. 350 (1997); *Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 204 (M.D. Pa. 1993) (RICO claims would "upset the balance of relationships between insurance entities and insureds which are established and regulated" by Pennsylvania law).

Furthermore, in order to protect its citizens who are policyholders, Pennsylvania, like all or virtually all of the other states, regulates extensively to ensure that insurance companies located or doing business in the state are financially sound. *See* MetLife's Pet. at 26-27. Permitting civil RICO claims with their mandatory treble damages and attorneys' fees in the insurance context could endanger the financial stability of insurers and frustrate state regulation aimed at preserving that financial stability.

In short, the Third Circuit's decision ignores the serious impairment that allowing RICO claims would cause to Pennsylvania's UIPA, 40 Pa. S. § 1171 *et seq.*, and Pennsylvania's other insurance regulatory statutes, *e.g.*, 40 Pa. S. §§ 71-72. Permitting RICO claims would nullify the balancing of competing policy interests that was made by the Pennsylvania legislature in establishing the Pennsylvania regulatory system. The Pennsylvania legislature gave effect to its policy choices by setting appropriate penalties, providing certain statutory remedies to aggrieved policyholders and upholding Pennsylvania common law remedies. The Third Circuit's decision, permitting RICO's severe, mandatory remedies in the insurance context, would impair and disrupt the Pennsylvania statutory and regulatory system and should be reversed by this Court.

CONCLUSION

This Court should grant certiorari to resolve the conflict among the Courts of Appeals regarding the applicability of RICO under the McCarran-Ferguson Act and should schedule oral argument in this case on the same day as *Humana Inc. v. Forsyth*, 118 S. Ct. 2339 (1998) (No. 97-303).

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

RICHARD SABO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR AMERICAN COUNCIL OF LIFE INSURANCE

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July 29, 1998

IN THE

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OCTOBER TERM, 1997

No. 98-100002

METROPOLITAN LIFE INSURANCE COMPANY,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF AMERICAN COUNCIL OF LIFE INSURANCE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION

American Council of Life Insurance hereby moves, pursuant to Rule 37 of this Court, for leave to file an *Amicus Curiae* Brief urging the Court to grant the petition and schedule the case together with *Humana, Inc. v. Forsyth*, 114 F.3d 1467 (9th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303). The motion is necessitated by Respondent's refusal to consent.

American Council of Life Insurance ("ACLI") is the principal trade association for life insurance companies, representing 532 life insurers that have issued approximately 90% of the life insurance in force in the United States. ACLI files briefs before courts of appellate jurisdiction in cases which

raise significant questions of insurance law and which have a substantial impact on its member insurers and the public.

ACLI has a strong interest in the construction of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994), which generally reserves to the states the regulation of insurance and provides that, unless explicit, no federal law should be construed to "invalidate, impair or supersede" state regulation of the "business of insurance." 15 U.S.C. § 1012(b). In *Humana, Inc. v. Forsyth*, this Court granted the petition for certiorari to consider a split among the circuits on whether a federal RICO cause of action for treble damages would "invalidate, impair, or supersede" the state insurance regulatory systems. This case involves insurance sales practices, a core competency of state regulators, and, together with *Humana*, sharply poses the legal and policy implications at issue.

American Council of Life Insurance believes that the decision below, if upheld, will significantly alter the regulation of all insurance companies. ACLI thus respectfully prays that the Court grant the motion for leave to file its brief.

Respectfully submitted,

/s/ PHILIP K. HOWARD

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July 29, 1998

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR AMERICAN COUNCIL OF LIFE INSURANCE

American Council of Life Insurance, the principal trade association for life insurance companies in the United States, submits this brief *amicus curiae* in support of the Petition.[1]

Summary of Argument

The issue presented, whether a federal RICO treble damage claim will "invalidate, impair or supersede" a state's regulation

[1] Pursuant to Rule 37.6, American Council of Life Insurance states that counsel for no party authored any portion of the brief, and that no party made a financial contribution to the preparation or submission of the brief. Pursuant to Rule 37.2(a), ACLI states that respondent did not consent to the filing of this brief.

of insurance within the meaning of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994), is one of vital importance to the life insurance industry. Mandatory treble damages claims under RICO would threaten the financial stability of insurance companies and thereby undermine an important goal of state regulation. Further, the reasoning of the decision below would permit application of federal laws generally to state insurance regulation and thereby alter the regulatory balance. The issue is before the Court in *Humana, Inc. v. Forsyth*, 114 F.3d 1467 (9th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303). ACLI urges the Court to hear this case together with *Humana* because this case involves a standard regulatory concern, the sale of life insurance, and presents different regulatory schemes remedying such problems. This case thus provides the Court with the basis for a broader and more dispositive ruling than does *Humana* alone.

Argument

For over 100 years, the regulation of insurance companies has been the province of the states. This policy was reaffirmed by Congress in 1945 in the McCarran-Ferguson Act, which provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994), although explicitly encompassing many statutory crimes and violations of law, nowhere indicates that Congress intended it to apply to the business of insurance.

The court below held that a federal RICO action for treble damages would not "invalidate, impair or supersede" Pennsylvania insurance regulation. *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 195 (3d Cir. 1998). The basis for this

decision was that there was no "direct conflict" between a RICO claim and any state regulation, applying a test normally used to determine whether a state law is preempted by federal law. Similar holdings have been adopted by the First, Seventh and Ninth circuits.[2] By contrast, the Fourth, Sixth and Eighth circuits have held that a RICO claim alters the balance of state regulation and consequently is barred by McCarran-Ferguson.[3]

The Court has already recognized in *Humana* that the issue of whether a RICO remedy should "supplement" state insurance regulation, as held below, requires resolution by the Supreme Court. The value to the Court in hearing this case simultaneously is that it presents a traditional fact pattern of insurance regulation, and sharply poses the policy issues. In each of the following ways, this case will supplement *Humana*:

> (i) The MetLife allegations involve alleged misconduct in the sale of life insurance, an area the court below acknowledged as the "core" of insurance regulation. *Sabo*, 137 F.3d at 191. *Humana*, by contrast, alleges a scheme to misappropriate rebates from an affiliated health institution.
>
> (ii) Pennsylvania has enacted a comprehensive insurance regulatory scheme that aims to balance goals of consumer protection with protection of the financial health of insurers in the state. The Pennsylvania commissioner regularly conducts regulatory examinations of insurers, including in this situation. *See Sabo v.*

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[2] *Villafañe-Neriz v. FDIC*, 75 F.3d 727, 736 (1st Cir. 1996); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir. 1995); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir. 1992).

[3] *Doe v. Norwest Bank Minn.*, 107 F.3d 1297, 1307-08 (8th Cir. 1997); *Kenty v. Bank One*, 92 F.3d 384, 392 (6th Cir. 1996); *Ambrose v. Blue Cross & Blue Shield of Va., Inc.*, 891 F. Supp. 1153, 1165-67 (E.D. Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996).

Metropolitan Life Ins. Co., No. Civ. A. 94-307, 1995 WL 928256, at *3 n.1 (W.D. Pa. Jan. 4, 1995). A question before the Court is whether the availability of a RICO treble damages action would "invalidate, impair or supersede" the regulatory scheme.

(iii) The Pennsylvania legislature also passed its own RICO statute which, unlike federal RICO, provides no private right of action. 18 Pa. Con. Stat. Ann. § 911. In addition to its own comprehensive regulatory scheme, the jurisdiction in *Humana*, Nevada, has a RICO statute that permits treble damages claims in certain situations, although not as broadly as the federal action. Nev. Rev. Stat. §§ 207.350-207.520. As we note below, these distinctions in state law, depending on the Court's holding, could conceivably determine the reach of federal RICO.

The lower court's reliance on the "direct conflict" test when interpreting the scope of McCarran-Ferguson could dramatically affect the insurance industry by permitting a wide range of federal laws to apply to insurance regulation. The policy behind preemption, however, is exactly the opposite: the purpose is to *avoid* federal interference with state regulation by limiting preemption of state laws to the situations where they "directly conflict" with a federal statute. McCarran-Ferguson takes the presumption in favor of state law dramatically further and, in essence, precludes application of any general federal statute if it would impliedly "invalidate, impair or supersede" state regulation. By creating a presumption in favor of applying federal law to the business of insurance, the decision below turns the explicit mandate of McCarran-Ferguson on its head and undermines the purpose of the preemption doctrine.

Substantial uncertainty will result from the holding below as to whether any particular federal law "directly conflicts" with each state's regulatory scheme. Pennsylvania's RICO statute, as noted, might be held to apply to insurance miscon-

duct, but does not provide a private right of action. Does that clear intent of the Pennsylvania legislature to exclude a private right mean that there is a "direct conflict" with federal RICO, which provides a private right of action? Or does the absence of a private right under Pennsylvania RICO mean that there is no "direct conflict" on the basis, adopted by the court below, that the federal RICO statute merely supplements Pennsylvania law? Similar questions arise with respect to many federal statutes, and in each of fifty states, in light of the decision below.

Regulating insurance companies, unlike certain other areas of regulation, has always been two-sided. A state has an interest not only in deterring and remedying any misconduct by insurers, but also in ensuring that insurance companies remain solvent and healthy for the benefit of all the insured. Thus, in its choice of rules and remedies, the regulatory scheme crafted by the Pennsylvania legislature "establishes and regulates . . . . the balance of relationships between insurance entities and insureds." *Wexco Inc. v. I.M.C., Inc.*, 820 F. Supp. 194, 204 (M.D. Pa. 1993). The key to the ruling below, by contrast, was the presumption that "divergent state and federal implementation of similar legal norms" will not materially affect Pennsylvania's insurance scheme. *Sabo*, 137 F.3d at 194. This holding, which necessarily undermines a state's efforts to balance the interests of insureds and insurers, is contrary to established jurisprudence.[4] In general,

[4] *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (state remedies would upset "the balance of public and private interests so carefully addressed by the [Clean Air] Act"); *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 452 U.S. 77, 97 (1981) (right to contribution precluded by Title VII and the Equal Pay Act because such "new remedies might upset carefully considered legislative programs" embodied by the statues); *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953) ("[W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent."). The Court has also developed an abstention doctrine that cautions federal courts to withhold jurisdiction in instances where a comprehensive state regulatory program already occupies the field. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 325-27

as Justice Frankfurter noted, "remedies form an ingredient of any integrated scheme of regulation," and to permit dual remedies for the same wrong "only accentuates the danger of conflict" by "allowing two law-making sources to govern." *San Diego Bldg. Trades Council v. J. S. Garmon*, 359 U.S. 236, 247 (1959).

When deciding whether federal law should be applied "'in a field which the States have traditionally occupied,'" the Court has held that the state law should not be "'superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). There is no evidence that Congress intended RICO to apply to the business of insurance. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985). Thus, private claims under RICO, characterized by one appellate court as a "thermonuclear device,"[5] cannot be applied to that industry without subverting Congress's intent in the McCarran-Ferguson Act to reserve insurance regulation to the states.

(1943). *See also Alabama Public Serv. Comm. v. Southern Ry. Co.*, 341 U.S. 341, 351 (1951) (federal courts should "exercise their discretionary power to grant or withhold relief" in areas of traditional state concern "so as to avoid needless obstruction of the domestic policy of the states") (internal quotations omitted).

[5] *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

Conclusion

For the reasons stated, American Council of Life Insurance urges that the petition be granted and argument heard on the same day as *Humana, Inc. v. Forsyth*.

Respectfully submitted,

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